

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 WEST PALM BEACH DIVISION
4 CASE NO. 23-cr-80101-AMC

5 UNITED STATES OF AMERICA, Fort Pierce, Florida

6 Plaintiff, May 22, 2024

7 vs.

10:02 a.m. - 3:23 p.m.

8 DONALD J. TRUMP, WALTINE NAUTA, CARLOS
9 DE OLIVEIRA,

Defendants. Pages 1 to 200

10 TRANSCRIPT OF MOTION HEARING
11 BEFORE THE HONORABLE AILEEN M. CANNON
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

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STENOGRAPHICALLY REPORTED BY:

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LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter to the
Honorable Aileen M. Cannon
United States District Court
Fort Pierce, Florida

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1 (Call to the order of the Court.)

2 THE COURT: Good morning. Welcome. You may all be
3 seated. Let's call the case.

4 COURTROOM DEPUTY: United States of
5 America vs. Donald J. Trump, Waltine Nauta, and
6 Carlos De Oliveira, case number 23-cr-80101.

7 Will parties please make your appearance, starting with
8 Special Counsel.

9 MR. BRATT: Good morning, Your Honor. Jay Bratt,
10 David Harbach, Michael Thakur, and Anne McNamara on behalf of
11 the United States.

12 THE COURT: Good morning to all of you.

13 Let's see. Who is here for President Trump?

14 MR. BLANCHE: Good morning, Your Honor. Todd Blanche
15 and Chris Kise for President Trump, who is not here but was
16 excused by the Court because of a pre-scheduled trial outside
17 of the district. Good morning, Your Honor.

18 THE COURT: Good morning.

19 All right. Who is here for Mr. Waltine Nauta?

20 MR. WOODWARD: Good morning, Your Honor.
21 Stanley Woodward and Sasha Dadan on behalf of Mr. Nauta who is
22 also present. And then, also with us is my law clerk,
23 Ashleigh Bondoc.

24 THE COURT: All right. Good morning to all of you.

25 And, finally, who is here for Mr. De Oliveira?

1 MR. MURRELL: Good morning, Judge. Donnie Murrell on
2 behalf of Mr. De Oliveira who is present.

3 THE COURT: All right. Mr. Irving is not here;
4 correct?

5 MR. MURRELL: That's right. He is attending a
6 graduation.

7 THE COURT: All right. Okay. Well, as usual, I will
8 go over the standard admonitions. No use of any electronic
9 equipment in any way. No leaving the courtroom while the court
10 is in session, except in cases of emergency. Please use the
11 lectern when presenting argument. And, as usual, we have the
12 overflow room set up on the second floor.

13 Set for argument this morning is at docket entry 485.
14 This is titled "Defendant Waltine Nauta's Motion to Dismiss the
15 Superseding Indictment For Selective and Vindictive
16 Prosecution." That is a public motion, and it is brought by
17 Defendant Nauta only.

18 For record clarity, there is a corresponding sealed
19 version of that same motion, which is filed on the docket at
20 entry 493. The Special Counsel's opposition is publicly
21 docketed at 486, and it comes associated with a sealed exhibit
22 which is filed at entry 482.

23 I will note, and correct me if I'm wrong, Mr. Bratt,
24 that there doesn't appear to be a fully unredacted, sealed
25 equivalent to 486 on this --

1 MR. BRATT: That is -- that's correct, Your Honor.

2 THE COURT: Okay. And so for record completeness, I'm
3 going to ask the Special Counsel's Office to file that fully
4 unredacted version on the docket by this Friday. Any
5 questions?

6 MR. BRATT: No, Your Honor.

7 THE COURT: Okay. Next, we have the reply in support
8 of the motion that's filed publicly at 487, and there is a
9 corresponding fully unredacted version of that reply at 494.

10 And then, finally, there is the Special Counsel's
11 authorized surreply; that's at 488. And the same note I have
12 here, is that correct, Mr. Bratt, there is no corresponding
13 fully unredacted version of the surreply; is that correct?

14 MR. BRATT: That's correct, Your Honor.

15 THE COURT: Okay. So same request, please, by this
16 Friday.

17 MR. BRATT: Yes.

18 THE COURT: Now, to round out the Court's consideration
19 of the present motion, we have docket entries 101, 115, 116,
20 and 118. These were all previously sealed, but now are
21 unsealed following the Special Counsel's unopposed
22 representations on those items. Those four entries consist of:
23 First, an order by this Court entered in August of 2023,
24 requiring sealed briefing on allegations raised by counsel for
25 Defendant Nauta against Mr. Bratt of the Special Counsel's

1 Office regarding a meeting held on August 24th of 2022, between
2 Mr. Woodward and prosecutors. That bunch of documents also
3 contains the briefing following that order, and those are
4 contained in unsealed versions at 115, 116, and 118.

5 All right. Now, one final point -- and speaking in
6 general terms only to maintain grand jury secrecy -- there is
7 also entry 481. This is a sealed notice containing a motion
8 for disclosure and transfer, which Defendant Nauta filed in the
9 U.S. District Court in D.C., in April of this year, seeking
10 materials described by him as pertinent to the Court's
11 consideration of this pending motion to dismiss for selective
12 and vindictive prosecution. That motion for disclosure and
13 transfer has since been denied by the U.S. District Court in
14 D.C.; so no additional materials sought in that motion have
15 been presented or reviewed by this Court in its preparation for
16 today's hearing.

17 Now, let me just ask a general question of defense
18 counsel. At this point, sitting here today, are there any
19 pending motions for disclosure or transfer before the D.C.
20 Court in any respect? First, Mr. Woodward? Related to this
21 case.

22 MR. WOODWARD: No -- no, Your Honor.

23 THE COURT: All right. Mr. Blanche?

24 MR. BLANCHE: No, Your Honor.

25 THE COURT: Okay. All right. Mr. Murrell?

1 MR. MURRELL: No, ma'am.

2 THE COURT: Okay. All right. So that is the lay of
3 the land, at least from a docket perspective for the motion set
4 to be heard this morning. We, of course, have our separate
5 motion to be heard this afternoon related to pleading issues.
6 And that motion, I understand, is brought by all defendants.
7 So we will address that later today.

8 That covers my preliminary remarks. So, Mr. Woodward,
9 I understand you will be taking the lead this morning; is that
10 correct?

11 MR. WOODWARD: Yes, Your Honor.

12 THE COURT: Okay. Then, as usual, please come to the
13 lectern and present your argument. I will have some questions
14 as you go along.

15 MR. WOODWARD: Thank you, Your Honor. Can you hear me
16 okay?

17 THE COURT: Yes.

18 MR. WOODWARD: Your Honor, I will begin by
19 acknowledging the high bar for defense counsel in bringing a
20 motion for selective or vindictive prosecution. And in so
21 doing, will make a concession, which is that no court has ever
22 found that a presumptive -- that a presumption of vindictive
23 prosecution applies pretrial. And although we think that this
24 Court could do that, we also readily acknowledge that it is
25 premature for the Court to do that.

1 If I may, why could the Court find that a presumption
2 of vindictive prosecution is appropriate here? Because the
3 facts and circumstances are sufficiently unique to allow such a
4 conclusion.

5 What the Supreme Court has said is that a presumption
6 of vindictive prosecution arises in the context of a defendant
7 who challenges a conviction on appeal, is successful, and then
8 in retaliation for that success, the government brings more
9 stringent charges as against that defendant. Obviously here,
10 we're pretrial. There has been no conviction; there has been
11 no appeal.

12 What did happen here, however, is that Mr. Nauta
13 exercised his rights under the Constitution, not to appear
14 voluntarily before a grand jury and testify again. And
15 when -- when threatened or apprised of charges he was facing,
16 namely, perjury before the grand jury, he challenged the
17 sufficiency of those charges and, ultimately, of all the counts
18 that were brought against him in either the indictment or the
19 superseding indictment, perjury before the grand jury is not
20 one of the charges that was brought against him. He was
21 successful in his appeal, if you will, as against that charge.

22 So the facts and circumstances here are somewhat
23 comparable to where the Supreme Court has found that a
24 presumption of vindictive prosecution arises. However, as I
25 concede, it would be premature for the Court to make that

1 conclusion here because it need not, given the availability of
2 discovery that has yet to be addressed or provided in this case
3 concerning the prosecutorial acts that were taken, both at the
4 investigative stage and thereafter.

5 The standard, of course, as the Court is aware, is that
6 the -- is that prosecutors may not bring a charge as against a
7 defendant to punish that defendant for the exercise of their
8 constitutional rights. That is, per se, vindictive
9 prosecution. We cite Bonilla, a district court case in
10 this -- in this District that -- it goes through a litany of
11 other circuits to have addressed that standard.

12 Among those, United States vs. Sanders acknowledges the
13 high bar -- that is from the Second Circuit -- acknowledges the
14 high bar that defense counsel face in bringing a vindictive
15 prosecution claim, and then goes through what and when -- when
16 and where discovery is appropriate to support that claim. And
17 I quote: "Some evidence tending to show the essential elements
18 of the defense."

19 Here, Your Honor, we submit there is more than some
20 evidence of a vindictive prosecution. And I begin with my very
21 first interaction with the prosecutors concerning Mr. Nauta's
22 prosecution, and that is the now infamous meeting that I had at
23 the Department of Justice. It's been well-documented. The
24 Court alluded to ECF 101, 115, 116, and 118, where that was
25 originally documented.

1 And the Court will recall that when we initially had a
2 hearing on those papers, the Court inquired of defense counsel
3 whether there was anything we were asking the Court to do at
4 that time, and we said no. And that's because we had not yet
5 made a motion for vindictive prosecution. Now, here we are,
6 and we are asking the Court to do something about that
7 interaction. We are asking the Court to explore whether there
8 is proof of vindictive prosecution that arose in that meeting
9 and in the interactions that Mr. Nauta and his counsel had with
10 the prosecutors following that meeting. What we've laid out in
11 our papers is what we believe is a campaign of aggressive
12 posturing that resulted in --

13 THE COURT: What -- I guess, what specific discovery
14 are you looking for?

15 MR. WOODWARD: Well, for -- for starters, we would love
16 to know -- we would love to know whether there are any
17 communications between and among the prosecutors that either
18 established the veracity of their claim that this was an
19 innocent mistake based on inadvertent googling, or that
20 contradict the assertion that a -- a Google search and a review
21 of a website explains why there was a mistaken belief that I
22 served on a commission that I never served on.

23 If there are no such communications, then it's
24 obviously no burden to the government or the Special Counsel's
25 Office to confirm that. If there are communications about that

1 interaction, those would be telling in either refuting my
2 personal claim that -- that what happened happened, or not.
3 And if there are no communications, then there are
4 other -- there are other things -- other steps the Court can
5 take to get to the bottom of this. An evidentiary hearing, for
6 example, as we requested, would be appropriate to find out
7 whether all of the other prosecutors in that meeting
8 are -- would say under oath that what Mr. Bratt claims
9 happened, actually happened.

10 That hasn't been done yet. There are no sworn
11 affidavits from any of the prosecutors that say that his
12 characterization of the website that he reviewed is -- was
13 their understanding, or what was said in that meeting is
14 correct.

15 We -- I certainly can put on --

16 THE COURT: At this point, what do you bring to the
17 table in terms of a credible showing that would even entitle
18 you to a request for discovery?

19 MR. WOODWARD: Well, again, the Court uses the word
20 "credible." I will use the word "colorable." I think that's
21 what the case law has said.

22 The circumstantial evidence that Mr. Nauta was
23 vindictively prosecuted supports a conclusion that there is
24 more there, there. So, for example, in that meeting with
25 prosecutors, back in August of 2023, the only charge that was

1 discussed as against Mr. Nauta was perjury before the grand
2 jury.

3 THE COURT: I thought it was August '22.

4 MR. WOODWARD: Forgive me, Your Honor. The indictment
5 was in June, so it had to be have been August of '22.

6 THE COURT: Okay. Please continue.

7 MR. WOODWARD: The only charge that was discussed as to
8 Mr. Nauta was perjury before the grand jury. That is why we
9 requested an opportunity to review his grand jury transcript;
10 that is why, following that meeting, we -- we contended, we
11 laid out our case for why they could not pursue a charge of
12 perjury before the grand jury. And, in fact, they did not.

13 As the Court is now aware, Mr. Nauta also participated
14 in a recorded and transcribed voluntary interview with the FBI.
15 If we had been told that the charge he was facing was lying to
16 the FBI, a 1001 charge, in that May interview, we would have
17 requested the transcript of that interview.

18 The first time we learned -- the first time we learned
19 that the government was considering a charge of either 1001 or
20 corruption was when they sent a target letter advising
21 Mr. Nauta that he was the target of a grand jury investigation,
22 in a totally different district. Right? All of our
23 interactions occurred in the District of Columbia, and the
24 first time we learned that there was a obstruction charge
25 potentially coming against Mr. Nauta was when we received that

1 target letter.

2 So backing up, in May of '22, Mr. Nauta voluntarily
3 agrees to an interview with the FBI. He is asked about the
4 boxes at Mar-a-Lago. Following that voluntary interview, the
5 prosecutors come to Mar-a-Lago to review or to look at the
6 storage room where the boxes are kept. Unbeknownst to
7 Mr. Nauta, unbeknownst to even President Trump's counsel at
8 that time, the prosecutors come with a photograph that they had
9 obtained in their investigation.

10 This photograph depicts the storage room circa January
11 of 2022. And what they believe, what Mr. Bratt believes, as he
12 enters the storage room in June of '22, just a week or so after
13 Mr. Nauta's voluntary interview, what Mr. Bratt believes when
14 he sees the storage room on June 3rd of '22, is that there are
15 missing boxes. And that as a result, Mr. Trump's lawyer could
16 not have possibly reviewed all of the boxes containing
17 materials, including potentially documents with classification
18 markings.

19 As this Court knows, we take issue with the fact that
20 we still don't know how the boxes got back into the storage
21 room for the August 8th search.

22 THE COURT: I know. I know the -- the -- I don't want
23 to get confused on that.

24 MR. WOODWARD: So in June -- in June of '22, on
25 June 3rd, when Mr. Bratt walks into the storage room, he has a

1 photograph of what the room looked like in January. This is in
2 the affidavit in support of a search warrant for Mar-a-Lago
3 that was unsealed by the Court yesterday. They then interview
4 a number of witnesses, including Person 32, who explains to the
5 Special Counsel's Office -- excuse me -- to the prosecutors, at
6 that point, that boxes have been moved.

7 They also come to believe that Mr. Nauta was untruthful
8 in his voluntary interview with the FBI. And despite all of
9 this information, they put Mr. Nauta in the grand jury without
10 advising either him or his counsel that he is anything more
11 than a witness in this investigation. At best, he is a
12 subject. And at that point, he is really a target of the
13 investigation.

14 Now, when Mr. Nauta retained new counsel, again, he is
15 told not that he is a subject of an investigation involving the
16 obstruction of the grand jury, not that he is the subject of an
17 investigation involving false statements to the FBI in May of
18 '22, but that he is a subject of an investigation for perjury
19 before the grand jury in June.

20 And then in all of the interactions that we have with
21 the prosecutors leading up to the indictment -- extremely
22 cordial interactions with the prosecutors leading up to the
23 indictment, no mention is made that, in fact, he is the target
24 of an investigation for obstruction under 1512. And with
25 respect to the prosecutors, that is a fact that we would have

1 taken seriously because, as the papers made clear, we were in
2 the middle of a trial of conspiracy of 1512 -- under 1512(k)
3 and we're well aware of what a 1512 charge looks like and how
4 the government proves it. It's an entirely different charge.

5 THE COURT: Okay. When did you get the target letter?

6 MR. WOODWARD: The target letter was delivered to us
7 late in the evening, I believe, early June of 2023. I can pull
8 that up, though.

9 THE COURT: And that target letter, you say, indicated
10 only a -- a perjury --

11 MR. WOODWARD: No, ma'am. If I said that, I misspoke.
12 That target letter did confirm that he was the target of an
13 investigation for obstruction of the grand jury investigation.

14 THE COURT: Okay. But that's -- that's within a week
15 or so of the indictment being returned here?

16 MR. WOODWARD: That is correct. That is correct.

17 The target letter arrived on May 24th of 2022.
18 May 20 -- thank you, folks. May 24th of 2023. The indictment
19 followed about two weeks later.

20 THE COURT: Okay.

21 MR. WOODWARD: And, again, two significant facts about
22 the target letter:

23 One is that it was the first time we were advised that
24 he was the subject -- the target of an investigation for
25 obstruction.

1 Two, that that investigation was being conducted in the
2 Southern District of Florida. And what we know --

3 THE COURT: And why -- okay. This chronology that you
4 have laid out, why would it support, as you say, a colorable
5 basis for vindictive prosecution? In other words, is it
6 necessary or prudent or warranted for the government to advise
7 a potential witness before the grand jury that they are looking
8 into more allegations than the ones they've previously
9 identified?

10 MR. WOODWARD: Well, certainly the prosecutors have an
11 obligation to inform a -- to inform a grand jury witness if
12 they are a target of an investigation. And, in fact, the
13 Justice Manual lays out specific steps that they are to take in
14 advance of putting a target before the grand jury.

15 THE COURT: And so, in your view, what should -- what
16 should you have been made aware of?

17 MR. WOODWARD: In my view, they should -- in my view,
18 they weren't looking at Mr. Nauta as a target of an obstruction
19 investigation. They were looking at him as a cooperator in
20 their case. And when he refused to cooperate in their case,
21 when he exercised his Fifth Amendment right not to testify,
22 they retaliated against him by bringing an obstruction -- or
23 multiple obstruction charges against him in the -- in the first
24 federal indictment of a former president of the United States.

25 Charges, which we will talk about this afternoon, are

1 spurious on their face by the way that they're pleaded. They
2 shoehorn Mr. Nauta without alleging any knowledge of the
3 contents of the boxes, without, as the Court is aware, alleging
4 how the boxes got into the storage room that purportedly
5 contained these classified documents, by basing false statement
6 charges on testimony that they previously have not flagged for
7 defense counsel.

8 THE COURT: What do you mean?

9 MR. WOODWARD: The -- again, it wasn't until the target
10 letter had come forward that the prosecutors advised defense
11 counsel that they believed Mr. Nauta had been untruthful in his
12 testimony -- or, excuse me, not testimony, but in the
13 statements to the FBI.

14 In fact, in his grand jury appearance, he's asked about
15 those statements that he's later charged for making. And he
16 explains his answers. And that's -- you know, that's -- that's
17 probably a question for the jury, I appreciate that. But
18 certainly it's circumstantial evidence of why the way in which
19 the prosecutors pursued their investigation of this case,
20 presents a colorable claim of -- of vindictive prosecution.

21 And, Your Honor, I can't help -- I can't help but
22 observe that, right now, we are totally blind as to what
23 happened in the investigation in D.C. And we have been through
24 and we have reviewed how that investigation was presented to
25 the grand jury in Florida, and it is unconventional, to say the

1 least.

2 Among other things --

3 THE COURT: So what is your understanding of that?

4 When did the proceedings begin in earnest here?

5 MR. WOODWARD: The proceedings began in earnest here in
6 early May of 2023.

7 THE COURT: So about a month before the indictment?

8 MR. WOODWARD: And it -- exactly the same time that
9 Mr. Nauta is receiving a target letter. The first FBI --

10 THE COURT: And why do you say it's unconventional?

11 MR. WOODWARD: Well, because it is unconventional to
12 bring -- to investigate a case in a faraway district, take
13 aggressive investigative tactics in that faraway district, get
14 the blessing of the district court there to do things like
15 enter a crime fraud order, to improperly seek immunity and then
16 correct that process.

17 All of these things are happening in this faraway
18 district without the oversight of the court that eventually is
19 going to ensure the proper prosecution in that indictment. And
20 then time and again, we have seen the prosecutors, and now the
21 Special Counsel's Office, admit that they didn't follow
22 Rule 6(e) in this investigation. At least three times, I -- I
23 was -- I was made privy to grand jury transcripts without court
24 authorization.

25 My reading of Rule 6(e) suggests that a court was

1 required to authorize the transfer of any grand jury materials
2 down to the Southern District of Florida. We don't have any
3 authorization in discovery about that transfer. They simply
4 rolled down here and started presenting information that they
5 had gathered in the District of Columbia to a grand jury.

6 And -- and how did they do that? Did they sit and read
7 transcripts from what occurred in D.C.? No. We -- we have
8 summary testimony which the Supreme Court in
9 United States vs. Helstoski has admonished prosecutors from
10 presenting. I'm going into a tangent. I know this isn't in
11 the briefings, and I don't mean to surprise the Court, but I
12 just wanted to answer the Court's question about why this is
13 unusual. It is unusual, let alone in the prosecution -- in the
14 first federal prosecution of a former president of the
15 United States.

16 But in -- in any case, for the entirety of an
17 investigation to occur in the -- in the District of Columbia,
18 and then be transferred to the Southern District of Florida,
19 with a -- with a target letter -- I'm just putting this
20 together, frankly -- with a target letter following what looks
21 like less than a week after the investigation begins in the
22 Southern District of Florida.

23 And -- and the last point I will make on the -- the
24 investigation here is that there are just three substantive
25 witnesses. The Court has seen, in the sealed filing, all of

1 the witnesses that appeared before the grand jury, all of the
2 subpoenas to third-party entities that were issued by the -- by
3 the D.C. grand jury. I will find -- or if Ms. Bondoc would
4 help me find the ECF number for that sealed filing for the
5 record.

6 All of those witnesses appear before the D.C. grand
7 jury. Three substantive witnesses appear before the Florida
8 grand jury. Two of those -- excuse me -- four substantive
9 witnesses appear before the Florida grand jury. Two of those
10 are in furtherance of the superseding indictment.

11 And so for the underlying indictment, two substantive
12 witnesses; the rest are -- are FBI agents who provide summary
13 testimony.

14 THE COURT: When you say "two substantive witnesses,"
15 you mean in addition to an agent's summary testimony?

16 MR. WOODWARD: That's correct, Your Honor. Two -- two
17 human beings that don't work for the government.

18 THE COURT: So how many witnesses in total appeared
19 before the Florida grand jury, including law enforcement agents
20 summarizing previously provided testimony?

21 MR. WOODWARD: So one agent appeared multiple times,
22 but there were three agents who appeared before the Florida
23 grand jury. And then preceding the original indictment, there
24 were two civilian witnesses.

25 THE COURT: Okay. So five total?

1 MR. WOODWARD: That's my understanding, yes.

2 THE COURT: Okay. All right. So let's just get back,
3 though. In terms of the showing that you have made thus far to
4 support your request for discovery as to vindictive
5 prosecution, so far you have not made any arguments this
6 morning about selective; is that correct?

7 MR. WOODWARD: I have not addressed selective
8 prosecution.

9 THE COURT: Okay. So let's stop there.

10 On vindictiveness alone, what does the record contain
11 at this point that you think supports discovery on this issue?
12 Because there is --

13 MR. WOODWARD: I think all the Court need do is
14 acknowledge that as an officer of the Court, I'm representing
15 that I was told that I shouldn't do anything to mess up my
16 pending potential nomination for a judgeship. And when
17 Mr. Nauta, through counsel, refused to cooperate -- and when I
18 say "cooperate," I mean, capital C, 5K letter, right. This was
19 not -- this was not -- as most defense counsel will tell the
20 Court, we are cooperative at all times. We provide testimony
21 when required to do so. I hope the prosecutors behind me will
22 agree that generally, defense counsel, including myself, appear
23 in a cooperative posture.

24 This was capital C "cooperating" in pursuit of a 5K
25 letter at the result -- after the conviction of the target of

1 their investigation. When he refused to do that, they sought a
2 way to prosecute him any how they could, bringing charges that
3 they had -- the conversations that we had would have been
4 materially different if they had uttered the word "obstruction
5 of an investigation" in advance of prosecuting Mr. Nauta.

6 THE COURT: Okay. So just so I understand. The
7 specific discovery request that you are making is what? And
8 have you made that previously to the Special Counsel's Office?
9 So slowly, what exactly are you asking for?

10 MR. WOODWARD: All documents, communications,
11 concerning Mr. Woodward, because that is going to give us all
12 the communications that they had about that meeting, in August
13 of '22.

14 THE COURT: But just concerning Mr. Woodward, just full
15 stop? What do you -- what do you mean?

16 MR. WOODWARD: Well, I would hope, Your Honor, that
17 there aren't a lot of communications about me, but if there
18 are, they can say that. You know, what they have -- what they
19 have refused to do, Your Honor, is to provide us with the
20 proceedings before the grand jury in D.C.

21 THE COURT: But even if there were such communications
22 about you, counsel, why would that be relevant to -- to a
23 vindictive prosecution claim that would be -- that would be
24 brought by the defendant?

25 MR. WOODWARD: Well, so the -- the Special Counsel's

1 Office makes the argument that a vindictive prosecution claim
2 has to be retaliation as against the defendant himself or
3 herself -- but here, himself -- and not as against some
4 third party.

5 THE COURT: Correct.

6 MR. WOODWARD: But the cases they cite don't stand for
7 that proposition. First of all, I would point out that we
8 stood before Your Honor at the beginning of this case, and at
9 length discussed the definition of "defendant." And under CIPA
10 Section 3, the Special Counsel's Office is quick to tell
11 Your Honor that reference to "defendant," must mean defense
12 counsel. And then in their briefing here, they say reference
13 to defendant must mean defendant. So already they've made
14 the -- they've made --

15 THE COURT: Right. But I'm bound by the statutory
16 term, and we've discussed that issue. And as far as the case
17 law is concerned, it's pretty clear that the references are to
18 defendant holding an interest in that claim, not counsel.

19 MR. WOODWARD: And in -- in -- it cannot be -- and I
20 will -- and I will address the specific cases. It cannot be
21 that communications with defense counsel are excluded because
22 they're not permitted to communicate with -- with the defendant
23 himself. Once he is represented by counsel, they have to
24 communicate through his counsel, his agent. And -- and so
25 the -- the -- the threat as against his agent, and the other

1 coercive tactics that are employed against his agent, also
2 apply as to defendant.

3 And so they cite, for example, obviously all cases that
4 are outside of this district. But in
5 United States vs. Vincent, that is 2008, U.S. District, Lexis
6 90241. There, the alleged retaliation was because of something
7 that the defense counsel had done in a prior prosecution. But
8 as Mr. Bratt recognizes, he and I had not interacted. This was
9 our first interaction. So -- so that case is inapposite.

10 They also cite United States vs. Obie, 2018, U.S.
11 District, Lexis 206781, where the Court ultimately found that
12 there was no connection between an exercised constitutional
13 right and the prosecution at issue. Not that -- that the
14 interactions with defense counsel were inappropriate. There
15 wasn't an exercise of a constitutional right, which is sort of
16 the threshold bar we have to cross to get to a vindictive
17 prosecution claim. Moreover, the only stated basis for
18 vindictiveness was a motion to disqualify defense counsel,
19 which the Court found not to be frivolous.

20 THE COURT: All right. So I understand your request.
21 It's, quote, "all documents, communications concerning
22 Mr. Woodward."

23 MR. WOODWARD: Yeah. With -- with the following
24 caveat, which is that I had absolutely no expectation that the
25 District Court would -- in D.C. would rule in the way that it

1 did. I think this Court is absolutely entitled to see the
2 records that gave rise to this prosecution. I think that the
3 grand jury proceedings are tantamount to an understanding of
4 whether this prosecution was, in fact, vindictive or not. And
5 here is why, Your Honor: Because if the prosecutors
6 investigating Former President Trump were that aggressive as to
7 every single witness that appeared before the grand jury, so be
8 it. That -- that -- that may be a different claim entirely.
9 And we've seen other instances, and the letter and the motion
10 that Mr. Trusty brought on behalf of Former President Trump
11 reflects this. There was an interaction with one witness in
12 which they were pressured to waive attorney-client privilege.

13 So it may be that for every witness to appear before
14 that D.C. grand jury, that there were harassing and retaliatory
15 interactions. But if there is not, and if the only defense
16 counsel to have gone through everything that we went through in
17 those months during the investigation is Mr. Nauta's defense
18 counsel, then that -- that furthers the circumstantial evidence
19 that this was a vindictive prosecution because he refused to
20 cooperate against Former President Trump.

21 And so we think that pursuant to Rule 6(e),
22 when -- although they're permitted to transfer grand jury
23 materials to another -- for -- for purposes of another judicial
24 proceeding -- that's clear in the rule -- the rule also makes
25 clear that when that transfer is to another district, that this

1 Court was to be involved. And we're aware of no petition for
2 transfer from D.C. to the Southern District of Florida, and
3 we're certainly not aware of whether Your Honor or any other
4 judge in this court having any oversight of the
5 investigation --

6 THE COURT: Had the grand jury operated here, how would
7 that have changed the disclosure issues? In other words, would
8 there have been greater access, in your view, by this Court to
9 those materials if everything had taken place here, either from
10 the beginning or closer to the beginning, when it became clear,
11 presumably, that venue lied here?

12 MR. WOODWARD: Yes, Your Honor. Because all we'd be
13 asking is for the materials to be provided to you in camera for
14 your review of those materials, and for you to make an
15 assessment as to whether they're discoverable.

16 THE COURT: So having -- so -- so the Special Counsel's
17 decision to use the out-of-district grand jury -- just -- can
18 you clarify how, in your view, has that made disclosure in this
19 proceeding more challenging or more cumbersome?

20 MR. WOODWARD: Well, I will take, for example, our
21 request to transfer the -- all of the materials concerning the
22 crime fraud petition in D.C. We asked the District Court to
23 transfer all of those materials to this Court. The D.C.
24 District Court refused.

25 What does this Court not have? It does not have the

1 ex-parte submissions made by President Trump's counsel to the
2 District Court as part of its consideration of whether to enter
3 a crime fraud order.

4 In addition to an ex-parte submission, there was a -- I
5 think there were two hearings where it was just
6 President Trump's counsel and the District Court judge.

7 You have now been asked to review the sufficiency of
8 that motion, but you have been asked to do it with one hand
9 tied behind your back because you don't know what President
10 Trump's lawyers said to that judge when -- when she
11 issued the --

12 THE COURT: But wouldn't the right person to seek
13 disclosure be, then, counsel for Former President Trump? And I
14 understand there is no pending petition in D.C. to transfer
15 that full crime fraud docket to this Court.

16 MR. WOODWARD: So, respectfully, that -- if you're
17 asking whether we have standing to request materials concerning
18 the crime fraud petition that was -- or the crime fraud order
19 that was entered in D.C., I think the answer is yes. That
20 crime fraud order is part of the investigation that resulted in
21 the prosecution of Mr. Nauta. To the extent that we are
22 challenging the sufficiency of that investigation, or the
23 validity of the indictment that followed, I submit, Your Honor,
24 that we have every right to seek the disclosure of those
25 materials and -- and -- and to join in a request to vacate the

1 crime fraud order.

2 THE COURT: Okay. All right. Let's try to circle back
3 to the issues in this particular motion.

4 You've indicated a request for discovery. Have you
5 made that sort of request to the Special Counsel's Office in
6 any sort of letter in discovery proceedings or in -- or
7 discussions in this case?

8 MR. WOODWARD: Yes.

9 THE COURT: Okay. And when you made that request, what
10 specifically did you ask for?

11 MR. WOODWARD: I'm sure they will correct me if I
12 mischaracterize this -- and I don't intend to do so -- but I
13 believe the request was for communications concerning me,
14 Mr. Woodward. And that is the language that went into the
15 motion to compel that is pending before the Court.

16 THE COURT: So that one particular compel request, is
17 that itemized clearly in the motion to compel?

18 MR. WOODWARD: Yes, I believe there is a subheading
19 entitled: "Communications concerning Mr. Woodward."

20 THE COURT: Okay. And then, what response, if any, did
21 you get from the Special Counsel as to that specific request,
22 only that one?

23 MR. WOODWARD: I believe the generic response we
24 received to most discovery requests is, "We provided everything
25 that you are entitled to in discovery."

1 We also have made a specific request for the grand jury
2 proceedings in D.C., and the same response was, "We have
3 provided you everything that you are entitled to in discovery."

4 THE COURT: Okay. Now, you focus your discussion on
5 the comment about the potential judicial nomination. Is
6 that -- is that the extent of your concern vis-à-vis that
7 meeting in August? There is also additional discussion in the
8 papers about comments or descriptions of you as, quote, "not a
9 Trump lawyer," and something about giving up a lifestyle of
10 planes and golf courses. Does any of that have anything to do
11 with the pending motion before the Court?

12 MR. WOODWARD: Well, as offended as I may be not to be
13 a Trump lawyer, I'm not. I don't represent the former
14 president. So, no.

15 And two, as untoward as it is to threaten Mr. Nauta
16 with giving up a life of private planes and golf courses, no, I
17 don't think by itself that violates any of the ethical or other
18 applicable standards. In total, however, it is, again,
19 circumstantial evidence of what was really happening in that
20 meeting. The purpose of that meeting was to convince me to go
21 meet with my client for the very first time and tell him his
22 only option was to cooperate. And -- and that -- the way that
23 that was done is improper and, by itself, is a colorable claim
24 of vindictive prosecution --

25 THE COURT: But isn't that fairly standard, trying to

1 persuade attorneys to get their clients to cooperate? Why is
2 that problematic in and of itself?

3 MR. WOODWARD: Well, it's not. I'm sorry, Your Honor,
4 it's not. It's problematic when the defense attorney you're
5 meeting with is told that, "We wouldn't want to do anything to
6 screw up your potential nomination for a judgeship in the
7 District of Columbia."

8 THE COURT: All right. Now, there is some discussion
9 in the papers about the length of time that transpired from the
10 date of that meeting and any discomfort that you expressed
11 about that conversation. So what are your, I guess, thoughts
12 about that?

13 MR. WOODWARD: Sure. That I should have apparently
14 turned around and immediately gone to ethics counsel and lodged
15 a complaint against a colleague whom I hope to try many, many
16 cases with, not just this one. I think, Your Honor, we laid
17 that out in -- in our briefing as -- as ordered by this Court.
18 We try our cases in court, you know? And respectfully,
19 Your Honor, I'm a big boy, and I can take it.

20 The answer -- the answer to your question is --
21 why -- why didn't we do anything? Because this rose to the
22 level of misconduct when they retaliated against Mr. Nauta by
23 prosecuting him with charges that they have not previously
24 identified in their conversations with his defense counsel.
25 If, in that August 24, 2022, fateful meeting, they had said,

1 "We are investigating Mr. Nauta for obstruction of a grand
2 jury, under 1512(k)," among others, and then, in fact, they
3 indict him, maybe even in Florida, for obstruction of a grand
4 jury proceeding, then they -- then they would have laid all
5 their cards out about what they were doing. But, in fact, they
6 said to defense counsel, "We've got Mr. Nauta, on -- on perjury
7 before the grand jury."

8 So we asked: Prove it. Let us see his grand jury
9 testimony. And at first they said, no, we don't need to see
10 his grand jury testimony. Then they called me back. "We will
11 make it available to you. How quickly can you get to the Main
12 Justice?"

13 And after we had reviewed the grand jury testimony,
14 after we had reviewed the law in D.C., and we had -- and we had
15 explained to the prosecutors that because Mr. Nauta's
16 statements in the grand jury were literally true, they could
17 not prove perjury before the grand jury. And, in fact,
18 Your Honor, it is the only charge not in this indictment of a
19 former president. They don't charge him with perjury before
20 the grand jury. They say that they think he lied before the
21 grand jury. They say that he was untruthful, both in his
22 testimony -- in his statements to the FBI and the subsequent
23 grand jury. But they don't prosecute him with it. Why?
24 Because they know they can't.

25 So what do they do? They come up with a theory that

1 he -- that he aided and abetted Former President Trump, and
2 obstructing this investigation, without alleging that he knew
3 what was in the boxes, without clarifying how the boxes got
4 into the storage room. And we will talk about all of this this
5 afternoon, and we will just respectfully ask Your Honor to bear
6 this morning's conversation in mind when we talk about what
7 this indictment says this afternoon.

8 But when you look at this -- when you look at this
9 holistically, it's clear that there was a campaign to get
10 Mr. Nauta to cooperate in the first prosecution -- first
11 federal prosecution of a former president. And when he refused
12 to do so, they punished him, and that's a violation of his
13 constitutional rights.

14 THE COURT: Okay. So let's say the answer is, we have
15 no communications concerning you, Mr. Woodward. Then what?
16 Then what happens to your motion for vindictive prosecution?

17 MR. WOODWARD: Well, I'd like to see a sworn statement
18 from the prosecutors in the room that what Mr. Bratt represents
19 was said that day is, in fact, their recollection of what
20 was -- what was --

21 THE COURT: But what relevance would that fact on its
22 own have anymore? It's -- it's apparently being investigated
23 by OPR, although it appears that is fully stayed. So I
24 don't -- I don't know if anything is going on there.

25 MR. WOODWARD: It's -- it's not. My understanding is

1 that OPR has stayed that investigation to allow Your Honor to
2 assess the implication of the allegation in this case.

3 THE COURT: Well, I don't know. I don't know the
4 extent of the stay. It might just be an indefinite stay
5 pending full resolution of this criminal proceeding. I don't
6 know.

7 MR. WOODWARD: That's my understanding --

8 THE COURT: Okay.

9 MR. WOODWARD: -- that it will be stayed until the
10 resolution of this criminal proceeding.

11 THE COURT: Okay.

12 MR. WOODWARD: But they won't --

13 THE COURT: Have you been contacted at all by anybody
14 at OPR to take your statement or otherwise preserve any
15 evidence?

16 MR. WOODWARD: Have not.

17 THE COURT: Okay. Anything else you wish to add on
18 your motion?

19 MR. WOODWARD: Well, I will just address the
20 selectiveness, because I think it is inextricably intertwined
21 with the vindictiveness insofar as one of the -- one of the
22 prongs of vindictive prosecution is that there are comparators.
23 We flagged in our briefing comparators. And, again,
24 referencing the anonymized monikers that are now part of the
25 records here, there are a number of people who provided

1 information or testified before the grand jury that describes
2 conduct that is the same as what Mr. Nauta is alleged to have
3 done in the indictment, which is --

4 THE COURT: Well, that's very contested. The argument
5 on the other side is the quantum of evidence as to him is -- is
6 stronger. And so they're not similarly situated.

7 MR. WOODWARD: Well, the quantum of evidence is -- is
8 the same; it's the movement of boxes. And there are other
9 persons who moved boxes who aren't being charged in this case.
10 The only difference is that they didn't refuse to testify
11 before the grand jury. They didn't assert their Fifth
12 Amendment right under the constitution in the grand jury.

13 And we -- we also note that there -- in every
14 investigation -- in every investigation of the retention of
15 classified materials, there are supporters of the presidents
16 and former presidents and vice presidents and others
17 with -- that lawfully accessed that classified information.

18 We cite to the Hur report in our reply. The Hur report
19 observes that President Biden's ghostwriter deleted a recorded
20 conversation with Biden that contained classification
21 information. When asked about that deletion, he says, "I'm not
22 going to say how much of the percentage it was of my
23 motivation," when asked if -- if deleting the recordings
24 was -- was because of his awareness of the investigation. No
25 prosecution.

1 When emails were deleted from Former Secretary
2 Clinton's infamous email server, the individual responsible for
3 deleting those emails asserted his Fifth Amendment before
4 Congress. We know that because we represented him. Was he
5 prosecuted as a result of deleting those emails? No. So
6 Mr. Nauta finds himself among a host of -- of Mar-a-Lago and of
7 Trump 45 Office, and others who serve Former President Trump to
8 have moved boxes in and around Mar-a-Lago and elsewhere, but
9 the -- but the only one to be prosecuted following his refusal
10 to cooperate.

11 THE COURT: Is your position with respect to the
12 selective piece the same as to the vindictive? In other words,
13 that it's premature, absent a potential request or order
14 granting a request for discovery?

15 MR. WOODWARD: You know, Your Honor, the answer is yes.
16 And -- and, you know, we -- I have struggled with that answer
17 leading to today's hearing because as -- as zealous defense
18 counsel, I should come here and ask you to dismiss the
19 indictment and do it now, please, respectfully.

20 But also, Your Honor knows how seriously we take the
21 gravity of this indictment, and how important it is to us to do
22 what is right. And given the availability of additional
23 discovery that would either support or refute claims of
24 selective and vindictive prosecution, we think -- we think the
25 right -- the right avenue here is -- is to make the Court aware

1 of all of that, make the record as fulsome as possible, and
2 after consideration of all of that evidence, to make a
3 determination as to whether selective and/or vindictive
4 prosecution is -- is --

5 THE COURT: Is that request, on the selective piece
6 only, was that also contained as a stand-alone item in the
7 motion to compel?

8 MR. WOODWARD: The request on the selective piece? I'm
9 not following. I apologize.

10 THE COURT: In other words, you asked previously for
11 all docs, et cetera, and you said that that was contained in a
12 discovery request that is now still pending in the motion to
13 compel. My question is basically the same thing, but vis-à-vis
14 the selective -- the evidence related to alleged selective
15 prosecution. Is that also a specifically defined line item in
16 the motion to compel?

17 MR. WOODWARD: Yes, Your Honor. They are grouped
18 together, though. I mean, there's one request in support of
19 both selective and vindictive prosecution, in small part
20 because the case law on discovery with respect to vindictive
21 prosecution is limited. We cite the -- we cite the district
22 court case in this district, Bonilla, as -- as one that
23 discusses a defendant's potential right to discovery. It, in
24 turn, cites a number of circuits, not the Eleventh Circuit.

25 And, of course, Armstrong, in the Supreme Court,

1 specifically addresses pretrial discovery with respect to
2 selective prosecution. So in our motion to compel briefing, I
3 believe both -- I believe all of the defendants group together
4 selective and vindictive prosecution.

5 THE COURT: Okay. Now, one final question. Do you
6 know why the grand jury in the Southern District of Florida was
7 in Miami -- was convened in Miami as opposed to West Palm Beach
8 where the indictment was returned -- or filed, I should say?

9 MR. WOODWARD: No -- no. Well -- no, of course not,
10 Your Honor. There is a lot about -- there is a lot that we are
11 going to bring to the Court's attention in the coming days
12 about the investigation in the Southern District of Florida.
13 Among other things, we don't know why the grand jury was in
14 Miami.

15 THE COURT: I'm sorry. What do you mean there is a lot
16 that you are going to be coming forward with in the next few
17 days? What do you mean?

18 MR. WOODWARD: Well, I think -- again, returning to --
19 you know, the Special Counsel's Office has taken the position
20 that the District Court need not transfer any of the materials
21 to this Court. We think, to make that claim, under seal, in
22 the District of Columbia, that's -- that's offensive, frankly.

23 And so if that's -- if that's their view of how this
24 ought to have gone --

25 THE COURT: Are you referring to the already denied

1 petition?

2 MR. WOODWARD: That's right. But Your Honor, of
3 course, is well within her right to compel the Special
4 Counsel's Office to produce the materials to you. And if, in
5 that instance, they want to cite grand jury secrecy in D.C. and
6 claim that they can't provide you these materials, well, you
7 can dismiss the case.

8 I mean, for them to -- for them to stand behind a
9 district court judge in D.C. and claim that -- that you
10 presiding -- respectfully, that this Court presiding over this
11 prosecution is not entitled to the -- to the -- to the
12 investigative steps that were taken, to the evidence of
13 potential abuse of a grand jury, because some other judge says
14 so?

15 THE COURT: All right. Well, let's -- let's move on.

16 The answer to my question is, you don't know why there
17 was a use of a Miami grand jury versus a West Palm one?

18 MR. WOODWARD: No, Your Honor.

19 THE COURT: Okay. All right. Now, I just have another
20 kind of thematic question, and that concerns -- there is some
21 arguments in the briefs about just, essentially, rushed
22 production deadlines and other related purportedly unreasonable
23 timelines. Does that bear at all on your motion for vindictive
24 or selective prosecution?

25 There is some arguments about, for example, there being

1 one week between the submission of a grand jury submission to
2 another witness who is out of -- out of district, and the
3 request concerns documents that would take some time to
4 produce. But, again, I'm just trying to make sense of whether
5 any of that has anything to do with the pending motion before
6 me, that you now -- that you're bringing at docket entry 493.

7 MR. WOODWARD: Yes, it does, Your Honor. And, again, I
8 can't -- I'm not sure that I'm permitted to talk about it,
9 because the judge in D.C. has ordered those materials sealed,
10 even from Your Honor.

11 And so we don't -- you know, respectfully to
12 Judge Boasberg, who I have known for -- for as long as I have
13 been practicing law, this was not a fishing expedition. We
14 know what happened before that grand jury because, as has been
15 culled out before this Court many times, we represented a
16 number of witnesses in that grand jury.

17 And so when we make reference to improper prosecutorial
18 tactics in that grand jury, it's because we experienced that
19 firsthand, which is why we went, we thought procedurally
20 correctly, to the District Court in D.C. and asked for the
21 transfer of those materials to Your Honor. If Your Honor
22 reviewed all of those briefings and reviewed all the materials
23 and said, "Respectfully, Mr. Woodward, this is a fishing
24 expedition," so be it. And that's what we thought would
25 happen.

1 Now it appears that they're -- that they're using the
2 district court in D.C. as a shield in order to prevent
3 Your Honor from getting access to what gave rise to this
4 prosecution. What are they trying to hide from Your Honor?

5 Now, again, as we reviewed Rule 6(e), we thought the
6 appropriate place was to make a request of the district court
7 presiding over that grand jury and have it transferred to you.
8 Now, given the posture of this case, we think we make that
9 request to you, Your Honor, and you order the Special Counsel's
10 Office to produce it, and they can decide what to do at that
11 point.

12 THE COURT: Okay. Well, I will address whatever
13 motions are brought --

14 MR. WOODWARD: I understand.

15 THE COURT: -- so long as they're procedurally proper,
16 but there is no such motion before me at this time.

17 MR. WOODWARD: That's correct, Your Honor.

18 THE COURT: So I think I have covered my questions.

19 Anything else you wish to add on your motion? And if I
20 have any further questions, I'll come back to you after I hear
21 from government counsel.

22 MR. WOODWARD: Thank you, Your Honor.

23 THE COURT: Okay. Thank you.

24 Okay. Will it be Mr. Harbach? Mr. Bratt? Okay.

25 MR. HARBACH: Good morning, Your Honor.

1 That was difficult to sit through for lots of reasons,
2 not least of which is I know -- I know that Your Honor,
3 maybe -- maybe more than any judge I have been before,
4 understands that we operate within a framework of rules and
5 doctrine, actual doctrine. We are here this morning, and what
6 we were supposed to be arguing this morning is a motion to
7 dismiss the indictment for selective and vindictive
8 prosecution.

9 Now, in the papers that are before Your Honor,
10 Mr. Woodward has said repeatedly -- correction -- Mr. Woodward
11 on behalf of Mr. Nauta has said repeatedly, in at least two
12 pleadings, that this indictment should be dismissed because of
13 actual vindictiveness. He has taken that position.

14 He has also taken the position that the indictment
15 should be dismissed for selective prosecution. This morning,
16 the first words out of his mouth were about the presumption of
17 vindictiveness, which is an entirely different thing, and it's
18 no more appropriate a finding here than a finding of actual
19 vindictiveness for reasons I will get to in a moment.

20 More substantively, for the better part of an hour, we
21 heard all kinds of stuff, all kinds of stuff, not a word of
22 which is in any of his papers, nothing about whether the
23 government allegedly should have told Mr. Nauta before that
24 first meeting that they might be looking at him for 1001
25 charge. It's a garbage argument to begin with, for the reasons

1 that Your Honor has already alluded to, but none of that is in
2 his papers.

3 It would have been nice -- it would have been nice, as
4 the government, to be able to respond in writing to a lot of
5 these allegations. But we weren't given that opportunity.

6 Now, I'm going to do my best. And I can respond to
7 every piece of the actual doctrine that's -- that's at issue
8 before the Court today, and I'm going to do that, but I just
9 want to mention a couple -- a couple little examples of why the
10 Court entertaining "seat of the pants" arguments at this podium
11 that are not in papers is dangerous. Just a couple.

12 One, Mr. Woodward suggested that Mr. Nauta -- it would
13 have been inappropriate for the government not to advise
14 Mr. Nauta before his grand jury appearance that he was a
15 target.

16 Well -- and this is what we just came up with just
17 sitting there -- at the time Mr. Nauta appeared before the
18 grand jury, the government didn't have the video. We had not
19 yet subpoenaed the CCTV that conclusively demonstrates what
20 Mr. Nauta did on June 2nd. So that's just one reason why that
21 argument is nonsense.

22 Here is another example. Mr. Woodward, in detailing
23 all of the alleged procedural violations that the government
24 engaged in in its grand jury practice in this case, he stated
25 as another example that the government never sought leave to

1 present any information to the Southern District of Florida
2 grand jury. Federal Rule of Criminal Procedure 6(e)(C) --
3 3(C): "An attorney for the government may disclose any
4 grand-jury matter to another federal grand jury." Period.

5 So for Mr. Woodward to stand here and suggest to you
6 with the tone he did -- that's just one little example -- that
7 the government behaved inappropriately here --

8 THE COURT: Well, I think what the -- I think the
9 argument was that it wasn't disclosure to the grand jury, but
10 disclosure to defense counsel.

11 MR. HARBACH: I'm not sure -- well, I think it may have
12 been both.

13 THE COURT: Okay.

14 MR. HARBACH: I think it -- I think it actually may
15 have been both. But I -- I'm not going to dwell on those
16 because I just mentioned those as an example of the point I
17 made a minute ago.

18 You make a motion. You make your arguments. Now, in
19 this case, as I know Your Honor knows -- I'm not going to dwell
20 here long -- he made a couple of -- he made some arguments in
21 his initial motion about, for example, selective and vindictive
22 prosecution. He tossed out a couple of comparators. He made
23 arguments about -- sorry -- that was for selective prosecution,
24 if I misspoke. He made a --

25 THE COURT: No. You said -- you said that.

1 MR. HARBACH: Okay. Thank you.

2 He made some arguments about vindictive prosecution
3 that were premised on a coffee chat he had with one of my
4 former colleagues, okay? Said nothing at all about the August
5 meeting in his motion to dismiss the indictment, okay? It
6 wasn't until the government responded and answered all of the
7 allegations that I just described, that he decided in his reply
8 to trot out the August 8th meeting. So, again, I don't know
9 what's going on --

10 THE COURT: All right. But you have had the surreply;
11 it's briefed at this point. I take your point.

12 MR. HARBACH: Okay.

13 THE COURT: But we have the authorized surreply. So
14 this issue of the August 24, 2022, meeting is now part of the
15 motion --

16 MR. HARBACH: Sure.

17 THE COURT: -- and it's also briefed in the earlier
18 filings that I mentioned at the beginning of this hearing.

19 MR. HARBACH: Yeah, and I'm -- and I'm -- I'm sorry,
20 Your Honor. Yes, Your Honor. And I'm going to -- I'm going to
21 get to the substance of all of that. I hope I have made my
22 point about the procedural gamesmanship that's going on here.
23 It's inefficient and it's not fair.

24 THE COURT: But by "gamesmanship," just specifically,
25 you are referring to the arguments about the timeline that had

1 he been -- had counsel been apprised of the charges being
2 investigated, there would have been a greater opportunity for
3 counsel, at the point that proceeding was still in D.C., to
4 work with -- with the prosecution in potential hopes of
5 dispelling those charges is, in general, I think maybe what I
6 heard. But that it was only towards the very end when the
7 obstruction count was -- was clearly delineated about a month
8 before the indictment.

9 MR. HARBACH: I'm -- I'm talking about that and
10 anything else that counselor for Mr. Nauta said in response to
11 Your Honor's question about, what is your evidence of
12 vindictive prosecution in this case?

13 There were -- there were dozens of minutes talking
14 about all kinds of stuff that's not alleged in his papers, some
15 of which I'm prepared to respond to today. But all I'm saying
16 is this is no way to run a railroad. If you're -- if you're
17 going to make a motion, make your motion, make your arguments.
18 Don't hold them until a reply. Don't hold them until oral
19 argument. So let's --

20 THE COURT: All right. Can we get -- can we get to the
21 substance?

22 MR. HARBACH: Sure.

23 THE COURT: What would you like to say in response to
24 those arguments if you wish to respond to them, and then in
25 response to any -- any other issues that were more meaningfully

1 briefed?

2 MR. HARBACH: Does Your Honor have a preference about
3 starting with selective or vindictive?

4 THE COURT: No.

5 MR. HARBACH: Okay. Then I will start with vindictive.

6 Again, Mr. Nauta has moved to dismiss the indictment
7 because he has alleged actual vindictiveness. The standard for
8 that, according to the Eleventh Circuit in
9 United States vs. Barner, is he must prove that the prosecutor
10 acted with genuine animus toward the defendant to punish the
11 defendant for the exercise of a legal right. That's the first
12 prong. And the second prong is that the defendant would not
13 have been prosecuted but for that animus.

14 Now, it's our position that Mr. Nauta has come nowhere
15 close to presenting any evidence on either of those prongs, and
16 here is why. Let's start with his motion. In his motion, as I
17 mentioned before, he argues that he has established genuine
18 animus with a single paragraph that mentions the coffee meeting
19 I said -- I talked about earlier. And he posits that because
20 the prosecutor told him that he wouldn't accept anything less
21 than full cooperation, and because the prosecutor declined an
22 offer of an attorney proffer by Mr. Woodward, that those facts,
23 he alleges, constitute genuine animus. And he says -- and he
24 said this part here today also -- that the right that he
25 allegedly exercised was his decision not to testify before the

1 grand jury in response to the voluntary invitation contained in
2 the target letter. That's the right he says that he was
3 punished for exercising.

4 In the first place, as the cases -- the cases
5 (indicating) that we have cited make quite clear in our papers,
6 Mr. Nauta was not exercising any Fifth Amendment right by not
7 testifying before the grand jury. The Fifth Amendment is only
8 implicated when such testimony is compelled, and a -- a person
9 invokes the right in response to that compulsion.

10 There is no right that Mr. -- no cognizable right in
11 this doctrine that Mr. Woodward exercised by deciding not to
12 testify before the grand jury. So that's the first thing.

13 Second, the idea that the government was punishing
14 Mr. Woodward -- excuse me -- Mr. Nauta or seeking to punish him
15 for not cooperating, that's plainly not the basis for a
16 vindictive prosecution claim. Your Honor has already alluded
17 to this. Bordenkircher alone dispels that proposition. There
18 is an Eleventh Circuit case called Davis that does the same.

19 The government seeking to persuade a defendant to
20 cooperate and then charging the defendant afterward or even
21 augmenting the charges afterward -- which wasn't at issue
22 here -- that a vindictive prosecution claim does not make. And
23 the cases make quite clear that that is the case.

24 Equally specious is the argument for the second prong,
25 which is the causation argument, the "but for" causation

1 argument. This argument, again, in his motion is, again, a
2 single paragraph that, if you actually read it, does no more
3 than regurgitate the conclusory heading. There is no evidence
4 in there; and what he alleges in that paragraph is no evidence
5 at all of causation. So that's the motion.

6 Let's talk about the reply. Again, this is the second
7 time that I -- the second occasion that I referred to earlier.
8 Crystal clear, he is urging dismissal of the indictment for
9 actual vindictiveness. There is no question about it. And he
10 relies this time on the August 2022 meeting that Your Honor has
11 spoken about.

12 The first and most important thing that I want to say
13 is that Mr. Woodward's story about what happened at that
14 meeting is a fantasy. It did not happen. But -- but you need
15 not even reach that question, and here is why. There are
16 several problems with the argument, quite apart from whatever
17 happened at that meeting. First, same question we have to ask
18 that -- that I mentioned earlier: What is the legal right that
19 Mr. Nauta exercised for which he was allegedly and vindictively
20 prosecuted? There is none.

21 Moreover, the animus that is alleged in the reply,
22 for -- that -- that relies on what happened at the August 2022
23 meeting, as well as the additional examples from Mr. Woodward's
24 other clients, all of that alleges animus as against
25 Mr. Woodward, not Mr. Nauta. Now, why is that? Because there

1 is no evidence whatsoever on this record of any animus against
2 Mr. Nauta. I'm going to say that again. There is not a single
3 bit of animus toward -- evidence of animus toward Mr. Nauta.
4 And, Your Honor, the reply doesn't even allege animus against
5 Mr. Nauta.

6 It says, quoting now from page 4 of the reply, "For
7 these reasons, Mr. Nauta is able to establish through objective
8 evidence that the Special Counsel's Office acted with genuine
9 animus toward defense counsel."

10 Now, what does the law say about that? Mr. Woodward
11 mentioned this briefly in his remarks. We have directed the
12 Court to cases in our papers -- this is in our surreply, which
13 I believe Your Honor said was ECF 488 -- it's at page 3 of the
14 surreply. These are cases that illustrate that animus toward
15 an attorney does not make out a vindictive prosecution claim.

16 Now, Mr. Woodward took issue with how we characterize
17 those cases. Your Honor could read them. But the better
18 question is this: Where is his case? Where is any case that
19 says a vindictive prosecution claim for a defendant can be
20 based on animus toward the defendant's lawyer? We haven't
21 found any. We don't think there are any. But at the very
22 least, Mr. Nauta hasn't directed Your Honor to any. The Court
23 doesn't need to go any further. There is no evidence --

24 THE COURT: So is the answer to the question in the
25 motion to compel for all documents, et cetera, about

1 Mr. Woodward -- is -- the answer is, there are no such
2 documents? Can you just -- I mean, what would -- it seems --
3 but what you're saying, that there would be no such responsive
4 information to that query?

5 MR. HARBACH: No. I'm -- that's not what I'm saying.
6 What I'm saying is that Mr. Nauta has not put any evidence
7 before this Court to even merit discovery, to even merit us
8 answering that question, much less that the indictment should
9 be dismissed. And I'm going to turn to discovery in just a
10 minute because, admittedly, you know, the standard is a little
11 different. And I'm going to turn to that.

12 But does that answer your question?

13 THE COURT: Sort of. So I guess what you are saying is
14 you're not sure or you're --

15 MR. HARBACH: No. I'm saying that -- I'm saying
16 that -- that Mr. Nauta has not presented enough -- any -- any
17 evidence to Your Honor to justify Your Honor compelling us to
18 answer that question. That's what I'm saying.

19 THE COURT: The argument is that the August 24, 2022,
20 allegations, which I know you dispute, qualify as such evidence
21 prompting the discovery request. That -- that, I think, is
22 what the argument is. So my question is, do you disagree that
23 the -- and I know you disagree with the factual recitation of
24 the August meeting. But would that provide a basis for the
25 discovery request?

1 MR. HARBACH: No. Because in our view -- this is what
2 I was trying to say a moment ago. Even -- even taking whatever
3 Mr. Woodward says about what happened at that meeting at face
4 value, the only allegation is that that demonstrated animus as
5 against Mr. Woodward. This is what I'm trying to tell you.
6 There is no allegation that the animus was directed at
7 Mr. Nauta. There isn't. And, you know, there is -- I will
8 point Your Honor to one other opinion that may make -- shed
9 light on what I'm trying to say here. Just a moment, please.

10 And, of course, I can't find it.

11 THE COURT: It's okay.

12 MR. HARBACH: The upshot is this. Here is the upshot.
13 Obviously, it goes back to what I said a moment ago
14 about -- about doctrine. We can imagine some crazy scenario
15 where the government really did something outrageous that is
16 plainly government -- that's plainly prosecutorial misconduct.
17 That doesn't automatically mean it supports a claim of
18 vindictive prosecution. It's the wrong vehicle. It's the
19 wrong doctrine. You don't -- you -- I think you understand
20 what I'm trying to say. And obviously, I'm conceding nothing
21 about what happened at that meeting, but that's --

22 THE COURT: I understand. As far as the meeting --

23 MR. HARBACH: -- that's the point.

24 THE COURT: -- itself, is there a dispute that there
25 was a reference to Mr. Woodward not being a, quote, "Trump

1 lawyer"?

2 MR. HARBACH: I'm not -- I'm not -- if Your Honor will
3 indulge me for a minute, I would like to spend a little time
4 explaining why Your Honor would be well positioned now, not
5 just for the legal reason I said a moment ago --

6 THE COURT: Can you just answer the question, though?
7 Is there a dispute about whether the characterization of
8 Mr. Woodward as not being a Trump lawyer, did that
9 actually -- was that actually said?

10 MR. HARBACH: That is knowable, but I don't -- I,
11 standing here right now, do not know.

12 THE COURT: Because in the papers, it seems like it's
13 not really challenged.

14 MR. HARBACH: Well, I'm going to -- I'm going to be
15 very careful here. I am reluctant to engage now in a detailed,
16 fact-by-fact discussion of what may or may not have happened at
17 that hearing except to say --

18 THE COURT: But you're willing to say it's a fantasy.

19 MR. HARBACH: I'm willing --

20 THE COURT: And so what I'm saying is we need to be
21 careful with the characterizations here. And I'm just
22 wondering why government counsel would use that phraseology.

23 MR. HARBACH: I'm not prepared to say. Because, again,
24 I -- I can't -- I personally can't confirm, one way or the
25 other, whether that was true, standing -- standing here.

1 But -- but, again -- again, at best, that's not animus against
2 Mr. Nauta.

3 THE COURT: And I think you have a decent point there,
4 for sure. But it just, you know, raises just a general
5 question that, you know, should comments like that be made? Is
6 that fully consistent with the highest standards of
7 professionalism?

8 MR. HARBACH: I'm not prepared to opine on whether the
9 statement was made, and if it was made, what the context was or
10 why it was made.

11 But Your Honor plainly not reached that question in
12 order to resolve this motion that is before Your Honor.

13 THE COURT: Right. Well, I still have inherent
14 authority to oversee this proceeding and ensure that
15 professionalism is maintained, and I think there is a basis to
16 ask those questions, which is why I'm asking them.

17 And then the next question concerns the issue of the --
18 the giving up the lifestyle, et cetera. I don't know why the
19 evidence can't just speak for itself.

20 Why do those comments have to be made?

21 MR. HARBACH: Excuse me one second, Your Honor. May I
22 have a moment, please?

23 THE COURT: Yes.

24 Tina, can you get some water for our deputy? Thank
25 you.

1 MR. HARBACH: May I continue, Your Honor?

2 THE COURT: Yes.

3 MR. HARBACH: My colleague advises me, really
4 reiterating something I already said, which is that
5 whatever -- to the extent those -- those fragmentary quotes may
6 have been said, and sounds like they may have been, they're
7 plainly fragmentary. They're out of context, and they have
8 been reported to Your Honor in a way, this morning,
9 that -- that isn't fair, taking full stock of what was going on
10 at that meeting.

11 But I'll remind Your Honor that the reason that I have
12 reacted so forcefully to -- to what Mr. Nauta says happened at
13 that meeting and the reason I said that it's a fantasy is
14 because of how he has characterized it in his papers. And
15 it's -- it's plainly untrue, and it's not -- it's not right.
16 And I want to -- if I can make just a --

17 THE COURT: All right. So at this point, I'm just --
18 in terms of the OPR, that is stayed. Do you know if there has
19 been any effort to preserve any evidence, if it exists, of that
20 meeting for purposes of the OPR investigation? My concern
21 is -- and, again, that's -- that's outside the purview.

22 But if -- but if there's an effort to conduct an
23 investigation, and it doesn't happen until years from now, what
24 evidence, if any, will exist at that point? In other words,
25 statements of the prosecutors who were in the room, maybe the

1 Zoom video recording, if it existed, or any other materials.

2 MR. HARBACH: I have already told Your Honor that no
3 recording exists. I have told you that some time ago. Your
4 question about whether there is an effort to preserve, you mean
5 by whom?

6 THE COURT: OPR.

7 MR. HARBACH: I can't speak for them. I don't know
8 what efforts they have undertaken to preserve anything. But I
9 can tell you this much --

10 THE COURT: Mr. Harbach, I'm going to ask that you just
11 calm down. I understand this is sensitive and it's difficult,
12 but these questions are briefed and they're before the Court,
13 so I'm having this hearing.

14 The answer is, I guess, there is no effort to preserve
15 any evidence that would be related to that meeting.

16 MR. HARBACH: That is not true, and that's not what I
17 said. That's not what I said. What I've just said is I don't
18 know what efforts OPR has undertaken. I did not say that there
19 were no efforts to preserve, Your Honor. I didn't say that.

20 THE COURT: Okay. What I mean is the matter is stayed,
21 so there is no activity seeking to preserve; is that incorrect?

22 MR. HARBACH: I don't know what efforts OPR is
23 undertaking, but this is what I can tell you. That the
24 government has not destroyed --

25 THE COURT: Thank you, Ms. Cassisi.

1 MR. HARBACH: -- altered, or done anything with any
2 evidence relating to what happened at that meeting. There has
3 been no -- there has been nothing like that.

4 THE COURT: Okay. And I'm sure that's accurate. I
5 know that it is.

6 Let's move on beyond the August 24th meeting and
7 just -- just touch on a couple of the issues with the grand
8 jury.

9 Can you just -- when did the grand jury
10 proceeding -- and I know this is in the papers -- begin in
11 D.C.?

12 MR. HARBACH: Your Honor, may I request that we remain
13 on the August meeting just for a moment? There is a couple of
14 points I have been trying to make.

15 THE COURT: Oh, sure. Certainly. I thought you were
16 of the view that it had no relevance and that it was not
17 credible to begin with.

18 MR. HARBACH: Yes. And -- and I'd like to elaborate
19 just for a minute about why it's not credible on the current
20 record.

21 THE COURT: You are welcome to make your arguments.

22 MR. HARBACH: Okay. Your Honor has already made the
23 timing point, so I'm not going to dwell on that except to --
24 except --

25 THE COURT: The "timing point," meaning the delay?

1 MR. HARBACH: Yes.

2 THE COURT: Okay.

3 MR. HARBACH: Except to point out that Mr. Woodward's
4 answer to Your Honor's question was that once it rose to -- it
5 rose to the level of misconduct when they made the decision to
6 prosecute.

7 Now, this is -- this is a lawyer. This is not the
8 client as much as the lawyer is anything right now who has made
9 allegations that really amount to his being extorted in that
10 meeting.

11 His answer to Your Honor was like it would have been
12 preposterous for him to have reported that, if it actually
13 happened, to some ethical board at the time. His answer to
14 Your Honor was, "None of that really mattered until they
15 decided to charge my client."

16 Well, the facts bear that out because it wasn't until
17 the eve of a target letter being served that Defendant Trump --
18 not Mr. Nauta, Mr. Trump filed a motion in D.C. seeking
19 disclosure of these materials. So our position is that that
20 timeline -- and this is all I'm going to say about it -- is one
21 factor Your Honor could take into account on this record
22 (indicating) to conclude that his allegation of what happened
23 at that meeting is not credible. But there's more.

24 If we pull back just a little bit and take a tour of
25 how Mr. Nauta, via Mr. Woodward's pen, has characterized this

1 claim over the course of the -- the papers, it also illustrates
2 how all over the place this claim is.

3 In the letter that Mr. Woodward wrote in June of
4 2023 -- and this is --

5 THE COURT: Yes, I know the letter. I have that.

6 MR. HARBACH: Okay.

7 THE COURT: The "to the best of my recollection" line?

8 MR. HARBACH: Oops. Sorry, Judge.

9 THE COURT: That's okay.

10 MR. HARBACH: No. No. The line is -- the line I was
11 referring to is this: "Mr. Bratt remarked that he was aware of
12 the fact that Mr. Woodward had been recommended for a
13 presidential nomination to the superior court of the District
14 of Columbia."

15 Next -- and then in the next paragraph: "It was
16 inappropriate for Mr. Bratt to mention the fact that
17 Mr. Woodward had been recommended for a presidential nomination
18 to the court." Then this is the key sentence: "The only
19 rational inference to be drawn from this reference, combined
20 with the assertion that the government's case as against
21 Mr. Nauta was strong and that Mr. Woodward was not a so-called
22 Trump attorney, is that somehow Mr. Woodward's potential
23 nomination to the superior court would be implicated by
24 Mr. Nauta's decision not to cooperate."

25 My point is this: At the time that that letter was

1 written, the basis for the allegation is, according to
2 Mr. Woodward, juxtaposition and inference. That's the first
3 data point.

4 On August 14th of 2023, the filing that Mr. Nauta made
5 in response to Your Honor's sua sponte order -- I think this is
6 118.

7 THE COURT: Yes, that's correct.

8 MR. HARBACH: In that response -- hang on -- he noted
9 that Former President Trump had posted some messages on Truth
10 Social. And according to his pleading -- this is at page 4:
11 "President Trump posted several messages on his Truth Social
12 media platform alleging prosecutors with the Special Counsel's
13 Office had attempted to 'bribe' and 'intimidate' a
14 lawyer" -- those -- "bribe" and "intimidate" were in quotes --
15 "a lawyer representing a witness in the case, and claimed that
16 the lawyer had been offered 'an important judgeship in the
17 Biden administration,' if the client 'flips on President
18 Trump.'"

19 The important part is three lines later. When
20 Mr. Nauta writes, talking about himself, talking about his
21 lawyer, Mr. Woodward: "Nor did defense counsel correct Former
22 President Trump's narrative." Because, as he says, we litigate
23 our cases in court.

24 Now, that plainly presupposes that there was something
25 to correct. And the government's suggestion is that the

1 correction is that there was no attempt to bribe and intimidate
2 Mr. -- Mr. Woodward by Mr. Bratt. But, again, this is what
3 Mr. Woodward said. That's the next data point.

4 The last one -- sorry.

5 THE COURT: So there is the timing?

6 MR. HARBACH: Yeah.

7 THE COURT: Okay. And then there's this correction
8 sentence?

9 MR. HARBACH: Yeah.

10 And then if you look at -- if you look at his reply --
11 so we've gone from juxtaposition and inference to somebody
12 else -- President Trump says "bribe" and "intimidation,"
13 that -- that needs to be corrected. And then we go to
14 Mr. Nauta's reply on the pending motion, and he can't even keep
15 straight, within this motion, what his theory is of what
16 happened.

17 On page 3, subparagraph 2, describing Exhibit B,
18 characterizing Mr. Trump's request for disclosure. And here's
19 what it says: "Discussed Mr. Woodward's meeting with the
20 government on August 24th, 2022, in which Mr. Bratt
21 threatened -- threatened Mr. Woodward's judicial application in
22 exchange for failure to precisely comply with the
23 investigation." That's that characterization.

24 Now we're at threatened, okay, for failure to comply;
25 got to do something bad. Paragraph -- and then page 4. This

1 is what page 4 says: "Mr. Bratt attempted to coerce
2 Mr. Nauta's compliance with the investigation by dangling
3 potential favorability on Mr. Woodward's potential judicial
4 nomination."

5 THE COURT: You're reading from the reply?

6 MR. HARBACH: Yes, ma'am.

7 THE COURT: Okay.

8 MR. HARBACH: So that's, like, kind of a carrot theory
9 of persuasion. The point is this: None of that happened. I
10 mean, you might -- Your Honor will be well within your rights
11 to ask Mr. Woodward, "Well, which was it? Was he threatening
12 to derail your judicial nomination? Or was he dangling
13 something favorable in front of you in exchange for, you know,
14 helping?"

15 The point isn't that either one of those is better than
16 the other, or maybe even isn't that, you know, they're both
17 sides of the same coin. The point is it didn't -- none of it
18 happened. Neither one of those things happened. And the fact
19 that he, Mr. Woodward, has characterized them all these
20 different ways on the -- on the -- across all of these
21 pleadings should suggest to Your Honor that there is something
22 rotten in Denmark and it didn't happen the way he said it did.

23 So that's the point I wanted to make that would enable
24 Your Honor to -- to make a finding, with facts in the record
25 before you, about why Mr. Woodward's story about what happened,

1 that meeting, is not credible.

2 Now, on the -- can I have just a second, please?

3 THE COURT: Yes. Just for planning, we're going to go
4 no later than 12:10 on this motion.

5 MR. HARBACH: I forgot one other -- I forgot. I found
6 the piece of paper I was looking for. I forgot one other
7 thing. So there are the three points that I made, and then the
8 fourth one is that in his actual motion for selective and
9 vindictive prosecution he says nothing, zero about this. That
10 should also communicate to Your Honor the likelihood that it
11 actually happened the way he says it did.

12 THE COURT: Okay.

13 MR. HARBACH: So I can -- I can shift to talking about
14 the discovery standard for a moment before I --

15 THE COURT: Well, I had a question about when did the
16 D.C. grand jury begin.

17 MR. HARBACH: Oh, you did. I am going to have to check
18 with my colleagues on that because that predates me.

19 THE COURT: Okay. Yes. Please do that.

20 MR. HARBACH: It's April 26, 2022, Your Honor. And I'm
21 told that that's paragraph 56 of the superseding indictment --
22 excuse me, 52.

23 THE COURT: Okay.

24 MR. HARBACH: 52.

25 THE COURT: And then it began in Florida in -- in May

1 of 2023; is that right?

2 MR. HARBACH: Sounds about right, Your Honor. Let me
3 check.

4 Your Honor, I'm told it was approximately May 7th, was
5 our first appearance down here.

6 THE COURT: Okay. Do you know why it took so long to
7 come to Florida on a case related to retention of documents in
8 Florida?

9 MR. HARBACH: So long in terms of the length of the
10 investigation? Or...

11 THE COURT: Right. I mean, it just seems at some point
12 it became evident that the locus of the alleged crime was West
13 Palm Beach; correct? And I'm just curious why the timeline,
14 going all the way to May, about a month before an indictment.

15 MR. HARBACH: Well, there -- there -- there
16 were -- there was plenty of additional investigation going on
17 in the interim between April of '22 and May of 2023.

18 THE COURT: Certainly, there was additional
19 investigation. But I guess, my question -- why was that
20 investigation not being conducted via a Southern District of
21 Florida grand jury?

22 MR. HARBACH: Well, I -- without going into too much
23 detail, I can say that the investigation that was ongoing
24 before the D.C. grand jury had -- had adequate nexus to
25 continue in Washington. I'm not prepared to comment on the

1 date on which a decision to charge in Florida was made or what
2 the internal deliberations were on that subject. But the
3 government's position is that there -- there was not remotely
4 anything untoward with our grand jury practice in this
5 instance.

6 THE COURT: Are you aware of any other case where there
7 has been sort of the double use of grand juries in this way? I
8 mean, maybe it's customary. I'm just asking, are you aware of
9 any other cases where it's been done this way?

10 MR. HARBACH: Well, I'm not sure what -- what -- I want
11 to be careful about reading too much into what Your Honor means
12 by "in this way," but --

13 THE COURT: Using an out-of-district grand jury for an
14 investigation related to unlawful retention of documents in a
15 district other than the district associated with the grand
16 jury.

17 MR. HARBACH: Well, I -- as so phrased, no. But I've
18 personally been involved in cases where an investigation has
19 taken place, principally, in one district, and the -- and
20 the -- the indictment is presented to a grand jury in another
21 district. That's not all that unusual.

22 THE COURT: I guess the reason for part of the question
23 is that at this posture, the use of the out-of-district grand
24 jury has presented challenges in terms of the petitions for
25 disclosure. And it makes it quite hard for this Court to know

1 what exists in terms of grand jury material because all that
2 litigation has to happen somewhere else. And that's kind of
3 what I -- I think that's what is prompting the question is, if
4 the procedure had been brought down to Southern District of
5 Florida at an earlier point, then perhaps these issues wouldn't
6 have arisen.

7 MR. HARBACH: Candidly, it might depend on at what
8 point they were brought down vis-à-vis whatever proceedings
9 that were taking place in D.C. that Mr. Woodward is half
10 complaining about, half seeking to get discovery about,
11 occurred. Maybe, maybe not. I'm not sure. But if Your Honor
12 is suggesting that -- and you may not be, so I really --

13 THE COURT: I'm not making any suggestions. I'm just
14 trying to ask very simply, what was the chronology? Why did
15 it -- why did the chronology pan out in the way that it did,
16 and -- and has this presented an issue or a concern at all in
17 terms of the disclosures for grand jury material?

18 MR. HARBACH: I think maybe the best way to answer
19 Your Honor's question is to direct Your Honor to our -- our
20 responsive papers that we filed before Chief Judge Boasberg.
21 They make quite clear our position on the application of
22 Rule 6, the relative powers and duties of Your Honor, and of
23 Chief Judge Boasberg. And I think we made it quite clear in
24 that response that we were attempting to follow the strictures
25 of the rule in -- in behaving as we did, and not because of any

1 preference one way or the other about who decided whether those
2 things should be disclosed.

3 Mr. Woodward, earlier today, in highlighting that the
4 relief he is seeking is nothing more than Your Honor to go
5 through whatever grand jury materials there might be and make a
6 judgment call about what should be disclosed and what isn't.

7 In our view, that -- that is plainly what Rule 6
8 forbids. He -- he -- he hasn't made --

9 THE COURT: Because it's not a pinpointed request? In
10 other words, it's not narrow enough?

11 MR. HARBACH: And it's not -- there is no -- there is
12 no -- it's not just an issue of narrowness, it's an issue of
13 justification. He -- he -- he -- he hasn't -- he hasn't
14 justified the -- he did not justify the relief he sought before
15 Chief Judge Boasberg and --

16 THE COURT: But what about, for example, on the crime
17 fraud proceeding? That's directly related to a substantive
18 motion before this Court, and it appears I don't have the full
19 briefing associated with that grand jury proceeding.

20 MR. HARBACH: Well, if what Your Honor is referring to
21 are materials that the government doesn't have, that -- that --
22 that may well be true, but --

23 THE COURT: So --

24 MR. HARBACH: -- we don't have anything that --

25 THE COURT: Let me just understand then. Everything

1 related to that proceeding has been disclosed to defense
2 counsel, except for things that the Special Counsel does not
3 have; would that be correct?

4 MR. HARBACH: That is correct.

5 THE COURT: Okay. And so the stuff that I'm talking
6 about that you don't have, that's -- that's the ex-parte
7 segment of that proceeding that you weren't privy to?

8 MR. HARBACH: Yes, Your Honor.

9 THE COURT: Okay. All right.

10 Okay. Thank you. That clarifies that.

11 All right. Now, just one other question on the grand
12 jury. Do you know why it was a Miami grand jury and not a West
13 Palm one?

14 MR. HARBACH: Only because I just got the answer a few
15 minutes ago. It was a matter of grand jury availability on the
16 dates that we were down here.

17 THE COURT: Okay. All right.

18 Okay. All right. So now, in terms of the discovery
19 requests on the -- with the doctrine in mind, could you present
20 your argument for why the discovery requests that Mr. Woodward
21 has described as pending in the motion to compel should be
22 denied --

23 MR. HARBACH: Yes, Your Honor.

24 THE COURT: -- in connection with the motion he has
25 brought this morning.

1 MR. HARBACH: Yes, Your Honor.

2 So the -- the standard for discovery in -- let's start
3 with the selective prosecution claim. I will come back to the
4 comparators in a moment, if Your Honor wants to hear about
5 that.

6 But the discovery standard for a selective prosecution
7 claim, as laid out in Armstrong and reiterated by the
8 Eleventh Circuit in United States vs. Cannon, is that it is a
9 rigorous standard. It requires the defendant to produce some
10 evidence tending to show the existence of the essential
11 elements of the claim, both of them, discriminatory effect and
12 discriminatory purpose. And obviously the threshold for the
13 first prong, the effect finding, is some evidence of
14 differential treatment of similarly-situated individuals.

15 Our position, both for the substantive relief that has
16 been sought, namely, dismissal of the indictment, and for the
17 request for discovery, is that Mr. Nauta has not come close to
18 satisfying that first criterion because none of the comparators
19 that he has proposed comes close to cutting the mustard.

20 The two Trump employees that he mentioned in his
21 motion, neither of them, even on his recitation of what
22 happened, did anything close to what Mr. Nauta did. We lay
23 that out clearly in our papers. I'm not going to rehash that.

24 And then in his reply Mr. Nauta says, well, wait a
25 minute, I wasn't just talking about those two. I was actually

1 talking about this whole other -- what he calls a universe of
2 comparators. So who were they?

3 First, he in his reply attempts to adopt President
4 Trump's comparators, and he mentions nine individuals
5 identified by name. But that doesn't go anywhere for Mr. Nauta
6 because those aren't comparators as to Mr. Nauta. Those
7 are at -- those are comparators that are alleged to have done
8 things similar to what President Trump did. So that's the
9 first problem.

10 And then his -- his last attempt is to mention the Hur
11 report. And quoting from his brief now, he says -- he is
12 referring to, quote, "other individuals, including but not
13 limited to, President Biden's former and/or current staff
14 members and associates who were, at a minimum, similarly
15 situated to Mr. Nauta." That's the sum total of his
16 explanation. He doesn't name anybody. He doesn't talk about
17 anything that they did. Just waving his hands at the Hur
18 report is not evidence. It's not evidence of any
19 similarly-situated comparators.

20 He said this morning that the only difference between
21 the first two comparators and Mr. Nauta is that they didn't
22 exercise their right not to testify. That's ridiculous. And
23 more to the point, Mr. Nauta cannot point to anyone who lied to
24 agents, lied under oath to the grand jury, surreptitiously
25 obstructed justice, and then helped to try and have evidence

1 exposing that obstruction deleted. He can't point to anybody
2 like that, which is what the standard in Smith -- which I
3 haven't read yet, but I'm sure Your Honor knows it -- requires.

4 Show me somebody who has done all of that, and I will
5 show you somebody who is indicted, because the only people who
6 are remotely comparable to him are his co-defendants. There is
7 not clear and convincing evidence. There is not some evidence
8 which is what discovery requires. There is no evidence at all
9 of similarly-situated comparators. That should end it.

10 THE COURT: I think you say in your surreply something
11 about the ghostwriter in the -- in the Hur report?

12 MR. HARBACH: Yes. Yes. And -- and this is one of
13 those occasions where we probably said something we shouldn't
14 have because we made a -- we -- we propped up an argument for
15 Mr. Nauta that he himself did not even make, and then he
16 attempted to latch onto this morning.

17 On that one, you can read our papers and you can read
18 the Hur report itself, which -- which, on its face, makes
19 crystal clear that the ghostwriter at issue there did nothing
20 like what Mr. -- Mr. Nauta did. Not even close.

21 THE COURT: So there was no deletion of relevant
22 materials?

23 MR. HARBACH: You know, you can -- you can -- let me
24 say it this way. That's not the right question.

25 THE COURT: Well, you -- you said that there

1 is -- there is no -- nothing comparable. So I -- I just want
2 to understand why you're saying that.

3 MR. HARBACH: What I said is that there is no one who
4 did all the things Mr. Nauta did. There is no one who
5 did -- who not only obstructed justice, lied to agents about
6 it, lied under oath to a grand jury about it, surreptitiously
7 did what he did moving the boxes, and then helped try to have
8 new -- try to have evidence in the form of these videotapes
9 that showed the obstruction deleted. You don't just get to
10 pick one of those things and say, oh, there is somebody else
11 who did part C, that person is a similarly-situated individual.
12 It doesn't work that way, not under the Smith standard which
13 I'm going to read now.

14 The -- it requires identification of a comparator who
15 committed the same basic crime in substantially the same manner
16 as the defendant, so that any prosecution of that individual
17 would have the same deterrence value and would be related in
18 the same way to the government's enforcement priorities and
19 enforcement plan, and against whom the evidence was as strong
20 or stronger than that against the defendant. That is the
21 standard.

22 The ghostwriter, the two former staffers or anyone else
23 that Mr. Nauta waves his hands at in the Hur report don't come
24 close. That is our position.

25 THE COURT: Based on the constellation of conduct that

1 you have gone through?

2 MR. HARBACH: Yes.

3 THE COURT: Okay. All right. No. I understand your
4 argument. Thank you. Okay.

5 MR. HARBACH: And -- sorry.

6 THE COURT: Okay.

7 MR. HARBACH: If I could briefly talk about discovery
8 on the vindictive side?

9 THE COURT: Yes, please.

10 MR. HARBACH: Okay. So on that one, the case law
11 is -- it just requires one more step -- the Bonilla case that
12 Mr. Woodward, and I think we also have cited to Your Honor,
13 addresses this point. The point being whether discovery is
14 authorized or appropriate on a claim of vindictive prosecution
15 at, looks like, star 5 of the opinion. I have the Westlaw
16 version. For the record, it's 2010 WL 11627259.

17 And the Court there concludes that -- or that the
18 standard for a vindictive prosecution is essentially the same
19 as for selective prosecution. And it cites another case
20 Mr. Woodward mentioned earlier, the Sanders case out of the
21 Second Circuit, which itself directly found that the standard
22 for obtaining discovery in a vindictive prosecution case is the
23 same as in a selective prosecution case.

24 So Armstrong and all of those cases, they talk about
25 the rigorous standard that should be applied and, of the

1 government's view, also applies in the -- in the vindictiveness
2 context. And for all of the reasons --

3 THE COURT: So how would you articulate that standard,
4 the threshold showing that needs to be made for discovery
5 purposes?

6 MR. HARBACH: Let's see. I wrote that down. It would
7 essentially be the same as the discovery standard for selective
8 prosecution without the last bit that requires some evidence of
9 differential treatment, obviously. It would be some evidence
10 of vindictive prosecution.

11 THE COURT: Okay. So it's the "some evidence"?

12 MR. HARBACH: Yes.

13 THE COURT: Okay.

14 MR. HARBACH: But -- but it must be as to both
15 elements.

16 THE COURT: That's correct.

17 MR. HARBACH: And it must be -- and it should be
18 applied in a rigorous manner for all the reasons that the Court
19 articulated in Armstrong.

20 I will -- well, I was about to say something about the
21 presumption of vindictiveness, which is where Mr. Nauta --
22 excuse me -- Mr. Woodward started today. Would you like me to
23 spend some time on that, or is that something that's not of
24 interest to Your Honor?

25 THE COURT: These issues are all of interest, so I

1 wouldn't rule anything out. It's whatever is pertinent to
2 resolution of the motion.

3 MR. HARBACH: Very good, Your Honor.

4 The reason I mentioned it at this juncture is that, in
5 the papers, it's only in the context of seeking discovery,
6 if that's the first time that the notion of a presumption of
7 vindictiveness appeared. And it's not immediately apparent to
8 the government what the connection is there, but that's where
9 it appears in the papers.

10 So I think, given the context in which he mentioned it
11 in his papers, meaning -- meaning he mentions it for the first
12 time in his reply, in connection with his position -- his
13 position today, more or less conceding that these things are
14 premature, I -- I don't know if he is conceding that -- that he
15 has failed to make any showing of actual vindictiveness or
16 actual selective prosecution; that -- that -- that is for
17 Your Honor to decide.

18 But regardless, on the substance, what he relies on to
19 try and substantiate a claim of presumption of vindictiveness
20 is the same series of items that I have already described are,
21 actually, no evidence at all of vindictiveness.

22 So I want to make one thing clear that I think is --
23 has been misstated in the papers. The government is not saying
24 that a -- the possibility of a presumption of vindictiveness
25 pretrial is foreclosed. Mr. Nauta interprets our papers as

1 saying that. We're not saying that. We cite to Barner, just
2 like he did. Barner makes clear that that, as a blanket rule,
3 is an open question. So I just want Your Honor to know that
4 that's not what we're saying.

5 What we are saying is that -- what the Court also says
6 in Barner, the presumption of vindictiveness depends on whether
7 or not the defendant has exercised a protected right. That's
8 the first thing. And then the second thing is even -- and this
9 is also quoting from Barner. I'm going to look at the opinion
10 on this one. Just a second.

11 THE COURT: And then I'm going to ask that you wrap up
12 in the next couple of minutes, please.

13 MR. HARBACH: Will do. Yes, Your Honor.

14 This is in United States vs. Barner at page 1318. The
15 Court says that it's not necessary for them to decide whether
16 the presumption can ever arise in a pretrial setting, quoting
17 now, "because even assuming compelling facts could justify a
18 presumption in a pretrial setting, such facts would have to
19 form a realistic likelihood of vindictiveness." That's at
20 1318.

21 And at 1320, this is said differently: "Assuming a
22 presumption could arise in the pretrial context, in addition to
23 the threshold showing of exercise of rights, absent here,
24 followed by augmentation of charges, Barner would have to
25 identify other factors that would raise a realistic likelihood

1 of vindictiveness."

2 And he has -- Mr. Nauta has done none of that here.

3 This is plainly not the case where a presumption is

4 appropriate. And -- oh, I'm not going to say that.

5 THE COURT: Okay. No, I think I understand your

6 argument.

7 MR. HARBACH: Yes. And so just to -- to recap, there

8 is no exercise of a legal right. There is no evidence of

9 animus toward Mr. Nauta. There is no evidence of actual

10 vindictiveness. There is no evidence to suggest any likelihood

11 of a vindictiveness in the way that that term is used in the

12 cases, such that a presumption would be remotely appropriate.

13 And for all of the same reasons, Mr. Nauta is not

14 entitled to any discovery either.

15 THE COURT: Okay.

16 MR. HARBACH: I think that wraps it up, unless you have

17 some other questions for me.

18 THE COURT: All right. I guess one last question that

19 concerns the docket entry -- which one was it? It's the 101

20 which ordered the sealed briefing.

21 Do you know why the motion for disclosure was filed on

22 an ex-parte basis in D.C.?

23 MR. HARBACH: Can I catch up to you just one second,

24 Your Honor?

25 THE COURT: Yes.

1 MR. HARBACH: Oh, you're talking about the sua sponte
2 order?

3 THE COURT: Yes, do you know why the application was
4 sought on an ex-parte basis if the order itself was directed to
5 both sides?

6 MR. HARBACH: I suspect it was in abundance -- it was
7 in an abundance of caution because the government may have been
8 aware that there were certain ex-parte materials on that
9 docket.

10 THE COURT: Okay.

11 MR. HARBACH: But -- but, as Your Honor may recall,
12 when we were filing the substantive response to Mr. Trump,
13 you know, it preceded on two tracks. And, ultimately, the
14 ex-parte version has been produced and produced to Your Honor.

15 THE COURT: So were there ex-parte portions of
16 that -- I have the docket sheet; correct?

17 MR. HARBACH: Yes, Your Honor.

18 THE COURT: Okay. So were there any ex-parte filings
19 on the docket that would be reflected in the docket sheet? I
20 think that would be maybe 1- --

21 MR. HARBACH: I don't have --

22 THE COURT: I'm not sure of the number.

23 MR. HARBACH: I don't have that in front of me,
24 Your Honor. But hang on one second, please.

25 THE COURT: Okay.

1 MR. HARBACH: Your Honor, my colleague has given me a
2 couple of answers. One is that that is -- that filing motions
3 like that, ex-parte, is standard practice in D.C. But more
4 substantively, the -- there was a -- there was a concern
5 because the movant was Mr. Trump, not Mr. Nauta or
6 Mr. Woodward.

7 And so there was a concern from that standpoint also,
8 that -- that Mr. Woodward may not have been authorized, given
9 the posture of the proceedings in Washington and that his
10 client was not --

11 THE COURT: Oh, so who was the movant?

12 MR. HARBACH: The movant was President Trump.

13 THE COURT: Oh, okay. And you're saying because the
14 sua sponte order was directed to Mr. Nauta's, that there needed
15 to be an ex-parte application?

16 MR. HARBACH: It was a -- it was a -- as I will say
17 again, it was a -- it was a confusing posture for us, and we
18 erred on the side of -- of what we did. It wasn't -- it wasn't
19 any --

20 THE COURT: It just was -- just struck me as a little
21 bit odd, because the order itself had been directed and had
22 been disseminated among counsel for all parties in this
23 proceeding. And so then it was unclear why, then, the
24 application was sought on an ex-parte basis.

25 MR. HARBACH: And I have -- I have answered your

1 question as best I know how.

2 THE COURT: Which is that it was the customary practice
3 to do it in D.C. on an ex-parte basis and there was some
4 confusion about the movant?

5 MR. HARBACH: Well, there wasn't confusion about the
6 movant. There was no question that the movant was Mr. Trump,
7 that the -- the party who made these allegations in Washington
8 was Mr. Trump, and that neither Mr. Nauta, nor Mr. Woodward,
9 had anything to do with it.

10 THE COURT: I'm sorry. Can we circle back? I'm still
11 confused.

12 There was an order here shared with counsel for all
13 parties requesting briefing --

14 MR. HARBACH: Uh-huh.

15 THE COURT: -- by a date certain.

16 MR. HARBACH: Uh-huh.

17 THE COURT: And then there was a request by the Special
18 Counsel for those materials in D.C., but that application was
19 filed ex-parte.

20 And I just want to understand. Why was it done
21 ex-parte?

22 MR. HARBACH: Again, the materials that
23 were -- that -- that the Court ordered us to produce and
24 ordered Mr. -- the Court's order is directed at the government
25 and Mr. Nauta.

1 THE COURT: Okay.

2 MR. HARBACH: Right? And -- but Mr. Nauta is not a
3 party to those proceedings in Washington.

4 THE COURT: All right. But he's -- he's aware -- okay.
5 I guess your question is just a technicality that, even though
6 he was fully aware of the order here, he was not permitted to
7 be aware of the application when it was filed.

8 MR. HARBACH: We were -- we were -- well, it
9 wasn't -- it wasn't just a naked application. There's
10 substance to it. It -- it was an awkward posture by virtue of
11 the fact that Mr. Trump had filed a motion making allegations
12 that Mr. Woodward had raised.

13 THE COURT: Okay. No, it just -- it's another little
14 wrinkle, I think, in the competing grand jury framework
15 that -- that is before me now. So -- all right. I have your
16 arguments. Thank you for the citations to case law.

17 I'm going to give Mr. Woodward five minutes, if he
18 wishes, for any rebuttal, and then we will be in recess until
19 the next hearing.

20 MR. HARBACH: Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. WOODWARD: Thank you, Your Honor.

23 With only five minutes, I won't belabor the point, but
24 I will just -- I'll just pick up where you left off.

25 If -- ex-parte means just -- just the Special Counsel's

1 Office. Rule 6(e) contemplates, in a petition for disclosure
2 like that, that all of the parties to that proceeding be
3 noticed. Why wasn't it filed in a manner that gave Former
4 President Trump's counsel notice that the materials were being
5 disclosed?

6 Of course, we knew what was happening because the Court
7 had ordered the provision of materials, but this has happened
8 time and again. I mean, in conjunction with the disclosure of
9 materials with respect to the crime fraud order, the Special
10 Counsel's Office did exactly the same thing. In fact --

11 THE COURT: Slow down.

12 MR. WOODWARD: Thank you.

13 They went ex-parte to seek disclosure of those
14 materials, not once but twice, after being advised that they
15 had improperly done it the first time under Rule 6(e). And it
16 was only after we reached out to the Special Counsel's Office
17 for explanation of what was going on that we were given access
18 to the subsequent petition for disclosure.

19 And if an abundance of caution is the reason why the
20 proceedings went that way, then why was defense counsel
21 provided with grand jury transcripts, not once, not twice, but
22 three times, in violation of the plain language of Rule 6(e)?

23 The only other point I will make about Rule 6(e) is
24 that I will apologize to the Court and to the government.
25 Mr. Harbach is correct in his reading of Rule 6. They did not

1 need to seek -- they did not need to seek court approval to
2 present materials in the grand jury in Florida.

3 What I intended to refer to is this -- this interesting
4 dichotomy that they're quoting from grand jury materials in
5 Florida without seeking permission of the Court in the District
6 of Columbia --

7 THE COURT: You mean in the superseding indictment?

8 MR. WOODWARD: In -- in both the -- in both the
9 original indictment and the superseding indictment.

10 THE COURT: Okay. All right.

11 Now, getting to the substance of your motion, am I
12 correct that at this point, really, the only request on the
13 table is a request for discovery?

14 MR. WOODWARD: That -- that's right, Your Honor. And
15 the -- you know, the -- my colleague describes our
16 characterization as fantasy. Plainly untrue, not right. But
17 despite all of that rhetoric, we end up in agreement, I think,
18 which is that there has to be some evidence, some evidence --

19 THE COURT: Okay. And then your last chance to tell me
20 what your some evidence is.

21 MR. WOODWARD: Was Mr. Nauta asked to cooperate? Yes.
22 That's not disputed. Was he threatened with a charge of
23 perjury before the grand jury? Yes. That's not disputed. Was
24 he then -- did he then refuse to cooperate? Yes. Not
25 disputed. Was he then charged with additional substantive

1 crimes that had never before been brought to his or his
2 counsel's attention? That's not disputed.

3 And so, the only logical inference to draw -- the --
4 the August 24th meeting; that is not vindictive. It's --
5 presumably, if Mr. Nauta had agreed to cooperate, we -- we
6 would all be friends here. It's the fact that he'd refused to
7 cooperate after that meeting that led to a vindictive
8 prosecution in the form of the indictment.

9 THE COURT: All right. As far as case law, do you have
10 any case that would support a grant of discovery on the basis
11 of the sequence you have just laid out?

12 MR. WOODWARD: Nor am I -- no. And nor am I aware of
13 any instance in which an individual refusing to cooperate is
14 ultimately not charged with the offense that is dangled in
15 front of him, but charged with more serious felonies, 20-year
16 felonies as a consequence of his refusal to cooperate.

17 THE COURT: Okay. And then the legal right you say you
18 have asserted that would fit in with the doctrine is what?

19 MR. WOODWARD: It -- I -- I also confessed to it being
20 confusing in our opening brief. We tried to clarify that in
21 our reply.

22 THE COURT: So what is it?

23 MR. WOODWARD: The legal right is his Fifth Amendment
24 right not to testify in any grand jury proceeding. Not -- not
25 the grand jury proceeding in Florida. But what the -- the

1 invitation was -- in August of 2022 was for Mr. Nauta to return
2 to the grand jury in D.C. And he respectfully refused to do
3 that.

4 THE COURT: Okay. Now, what about what I have heard is
5 some shifting descriptions of what happened during the
6 August 24th meeting?

7 MR. WOODWARD: I think -- I think the shifting
8 descriptions invites what we have asked for, is an evidentiary
9 hearing about exactly what was said. Our letter is
10 contemporaneous with -- is more -- most contemporaneous, and it
11 describes a discussion about the -- the -- the -- I have been
12 recommended for a judgeship in the District of Columbia.
13 That's -- that's beyond dispute.

14 The -- the, you know, in that meeting, there was an
15 envelope on the table that had printed materials about defense
16 counsel. Those things happened. What I understood at the time
17 is that Mr. Nauta's refusal to cooperate could be used against
18 him. I had never met the prosecutors in that room before. I
19 did not think that this was personal animus toward me. I still
20 do not think that they harbor personal animus toward me. This
21 is about the prosecution for the first time in history of a
22 former president and Mr. Nauta's refusal to cooperate in that
23 prosecution.

24 THE COURT: All right. So there is nothing more you
25 wish to add? What I have heard from Mr. Harbach is that if you

1 go through the filings, that the descriptions about what
2 happened is -- is not entirely consistent, and so I should
3 discard those allegations, both because they came too late and
4 because it's -- it's not clear what they consist of.

5 MR. WOODWARD: Well, I respectfully disagree that you
6 should discard inconsistent recitations of the -- the facts in
7 this case. They are -- they are consistent, if not identical.
8 They do describe an improper interaction with government
9 counsel. And -- and I'm here. You know, if -- if Mr. Harbach
10 or Your Honor have questions about what I recall happened at
11 that meeting, Ms. Dadan is happy to come to the podium, and I
12 will sit in the witness stand. We are requesting an
13 evidentiary hearing, Your Honor, and that's how we get to the
14 bottom of this. If there are no --

15 THE COURT: But even if we got down that road and we
16 went down that rabbit hole, what legal relevance would it have,
17 if any, on your pending motion?

18 MR. WOODWARD: I think it's significantly -- if -- if
19 it -- if it didn't happen, it does significantly diminish our
20 claim of vindictive prosecution, because the government is
21 allowed to threaten charges. The government is allowed to
22 supersede an indictment. That's clear in the case law.
23 They're not allowed to do it because a defendant has exercised
24 his or her constitutional rights. And in refusing to cooperate
25 in their investigation, he was exercising his constitutional

1 rights. And there is some evidence of that. And so as a
2 result, discovery is --

3 THE COURT: It's not clear, though, the connection
4 between the allegations that you have brought about the alleged
5 comments made to you and how those comments would have impacted
6 Mr. Nauta's decision not to testify.

7 MR. WOODWARD: I think the implication was that I was
8 to travel to meet Mr. Nauta and to persuade him to cooperate in
9 the investigation. And if Mr. Nauta did not cooperate in the
10 investigation, that there would be ramifications.

11 THE COURT: Okay.

12 MR. WOODWARD: And that was borne out in the subsequent
13 conduct that occurred over the course of the
14 government's -- the prosecutor's investigation of this case.
15 And so, we would not submit that the August 24th meeting is the
16 only basis on which this Court should grant a motion to dismiss
17 for vindictive prosecution. We submit that the August 24th
18 meeting is some evidence giving rise to a -- to a plausible
19 claim that's not -- or a realistic likelihood of
20 vindictiveness, and that -- that we've met the standard
21 necessary for the Court to order discovery on the question.

22 THE COURT: Okay. All right. Is that all,
23 Mr. Woodward?

24 MR. WOODWARD: Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. HARBACH: Your Honor --

2 THE COURT: Yes.

3 MR. HARBACH: I rise only to offer a factual
4 clarification, if Your Honor is willing to hear me.

5 THE COURT: Yes.

6 MR. HARBACH: Okay. One of my colleagues just pointed
7 out to me that in November of 2022, our office sent
8 Mr. Woodward a copy of the search warrant for one of
9 Mr. Nauta's devices, which search warrant made it quite clear
10 that we were looking at him for obstruction charges.

11 THE COURT: It's cited, this obstruction statute?

12 MR. HARBACH: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. HARBACH: And that's in November of 2022. That's
15 all. Thank you.

16 THE COURT: And in terms of the chronology, that fits
17 in, can -- Mr. Harbach, can you remind me? There was some
18 discussion of, okay, the May '22 voluntary interview, grand
19 jury in June of '22, some visits to Mar-a-Lago's storage room.

20 MR. HARBACH: Your Honor --

21 THE COURT: What's the point about the November date?

22 MR. HARBACH: Well, you would have to ask Mr. -- you
23 would have to ask Mr. Woodward what his point was in alleging
24 that Mr. Nauta was unaware at some point in time that he might
25 be under investigation for obstruction. And candidly, that was

1 not clear to me.

2 THE COURT: Okay. But you're saying there is a search
3 warrant for a device, dated November of 2022, that listed an
4 obstruction statute?

5 MR. HARBACH: That is correct. And it was produced to
6 Mr. Woodward in November of 2022.

7 THE COURT: Okay. All right. Thank you. Okay.

8 MR. WOODWARD: Your Honor, I think there is a factual
9 discrepancy here. I've looked at the search warrant in advance
10 of today's hearing because I wanted to make an accurate
11 representation. The search warrant that was provided to
12 defense counsel did not reference the obstruction statute; the
13 one that was produced in discovery does.

14 THE COURT: Well, can I see the one that was sent in
15 November?

16 MR. WOODWARD: Yes. We will make it available to the
17 Court over the lunch break.

18 THE COURT: Okay. Please send it to chambers, copying
19 government counsel. Thank you.

20 We are in recess until 1:30.

21 (A recess was taken from 12:10 p.m. to 1:35 p.m.)

22 THE COURT: Thank you. Please be seated. Everybody
23 looks to be here, so we will resume. We don't need to take
24 appearances again.

25 Just as a follow-up, over the break I received the

1 search and seizure warrant sent by Mr. Woodward.

2 Mr. Woodward, this does refer to the obstruction
3 statute. Is that correct?

4 MR. WOODWARD: It does, Your Honor. It does not make
5 clear that that's what they were investigating with respect to
6 Mr. Nauta. It simply says that -- that the FBI is permitted to
7 seize materials that they deemed to be in furtherance of an
8 obstruction committed.

9 THE COURT: Okay. But this is a device under the
10 control of Mr. Nauta, and there is a citation clearly to the
11 obstruction of federal investigation statute; correct? 1519?

12 MR. WOODWARD: Yes. But the -- of course, the FBI,
13 with a proper warrant, can seize a device belonging to anyone
14 if they believe that it has evidence of a crime as to another
15 person. Just because they seized Mr. Nauta's device does not
16 mean that that they were investigating Mr. Nauta for
17 obstruction.

18 THE COURT: All right. But I think there is at least
19 some basis to believe that there was obstruction being
20 investigated. Would you not agree with that?

21 MR. WOODWARD: 100 percent, we understood that
22 obstruction was being investigated --

23 THE COURT: Okay. So then all the business earlier
24 about not having any clue and had they said the word
25 "obstruction," things might have been different, that doesn't

1 necessarily square with the chronology; correct?

2 MR. WOODWARD: No. Respectfully, Your Honor, I never
3 meant to suggest that we did not understand Former President
4 Trump to be being investigated. We did not understand
5 Mr. Nauta to be being investigated for obstruction.

6 THE COURT: Okay.

7 MR. WOODWARD: So there was an investigation for
8 obstruction, yes. I think that was clear to all. It was not
9 made clear that Mr. Nauta was being investigated for
10 obstruction.

11 THE COURT: Okay. But this device, whose device is
12 this, this Apple iPhone?

13 MR. WOODWARD: One of the devices belonged to Mr. Nauta
14 personally; one of the devices belonged to the Trump 45 Office.

15 THE COURT: Okay. All right. Thank you. Okay.

16 Now, I did go back and look at the motion to compel
17 over the break. There is a section in there -- I wanted to see
18 if it -- if it matched up at all with the request you're making
19 now for discovery. There is a section in there about -- and
20 it's entitled: "Production of all correspondence and/or
21 communications concerning counsel." And there is a -- there is
22 a request here -- or, I guess, there is some discussion here of
23 a -- of a subpoena by the Special Counsel's Office for toll
24 records between you and another individual. Is this -- is this
25 part of the motion that you have brought this morning, or is

1 this a separate request?

2 MR. WOODWARD: No. It's -- it's part. The reference
3 to the -- the reference to the subpoena -- what we came to
4 learn in discovery is that, as the Court I'm sure is aware, the
5 prosecutors cannot obtain a subpoena for an attorney's records
6 easily. The Justice Manual describes the efforts that
7 prosecutors have to go through.

8 What apparently was done in this case is that, to
9 obtain my personal phone records, they subpoenaed third parties
10 and then had an FBI agent look through a third party's phone
11 records to identify phone calls with me. And so we cite that
12 prosecutorial prerogative or step as evidence that there is
13 likely to be communications between and among investigators
14 about Mr. Nauta's counsel.

15 THE COURT: Okay. But this was not made part of your
16 motion that we heard this morning. So is this -- this is not
17 part of the evidentiary foundation which you say entitles you
18 to discovery on the motion that we heard this morning?

19 MR. WOODWARD: That's correct. I don't know anything
20 more than that a request was made to review a third party's
21 phone records.

22 THE COURT: But that's not my question. You didn't
23 make -- you didn't discuss the request for toll records of
24 contacts between you and other people in your motion on the
25 basis of selective and vindictive prosecution; correct?

1 MR. WOODWARD: I did not discuss that, correct.

2 THE COURT: Okay. So that's not part of the threshold
3 showing that you think has been made for that motion for
4 purposes of your discovery request.

5 MR. WOODWARD: That's correct, Your Honor.

6 THE COURT: All right. Okay. Then let me just ask the
7 Special Counsel's Office.

8 Do you have any information about -- about why toll
9 records of contacts between Mr. Woodward and other people were
10 sought?

11 MR. BRATT: Good afternoon, Your Honor. Jay Bratt.

12 THE COURT: Good afternoon.

13 MR. BRATT: Mr. Woodward's calls with other people
14 appeared in toll records. We did not seek to go around the
15 Justice Manual by finding third parties whom we believed were
16 likely to have calls with Mr. Woodward.

17 THE COURT: So there was no -- there was no request for
18 toll records directed at Mr. Woodward's contacts; is that
19 correct?

20 MR. BRATT: That's correct. He showed up in records.
21 So I think we would dispute the characterization there.

22 THE COURT: Okay. So the subpoenas were for people
23 other than Mr. Woodward; is that right?

24 MR. BRATT: That's correct.

25 THE COURT: And in the course of receiving results from

1 those subpoenas, Mr. Woodward's phone number appeared?

2 MR. BRATT: Correct.

3 THE COURT: Okay. But there was never any specific
4 requests for the toll records of Mr. Woodward's phone; is that
5 right?

6 MR. BRATT: That's correct.

7 THE COURT: Okay. Okay. That's all I have.

8 Then let's turn to the motion for this afternoon.

9 MR. WOODWARD: Your Honor, I'm not -- I wasn't
10 suggesting that there was a subpoena for my phone records.
11 After the Special Counsel's Office received a third party's
12 phone records, there was a specific request for an FBI agent to
13 review those phone records for calls with me. So this wasn't
14 an incidental review of phone records and my phone number
15 happened to come up. There -- there is a -- there is --
16 discovery shows that there was a specific request of an agent
17 to review a third party's phone records for calls to me.

18 THE COURT: And -- all right. Well, because this
19 wasn't raised in your initial motion this morning and it's not
20 part of the evidentiary foundation for that motion, I don't
21 think it's appropriate to delve further into those details, but
22 it is included in the motion to compel, which remains pending.
23 So that is where we will leave that.

24 MR. WOODWARD: Fair enough, Your Honor.

25 THE COURT: All right. Let's turn to the other motion.

1 This is a motion to dismiss indictment. It's docket entry 352.
2 It's brought by all three defendants pursuant to Rule 12 for
3 failure to state an offense and for related pleading
4 deficiencies. There is an opposition to that motion at 378,
5 followed by a reply in support of the motion at 556.

6 So let's hear argument on that.

7 MR. WOODWARD: Thank you, Your Honor.

8 This is a -- this is a technical argument about what is
9 necessary in framing an indictment. I'd like to start,
10 Your Honor, I think, with what is the strongest argument in the
11 motion, and that pertains to Counts 34 and Counts -- Count 34
12 and 36 of the indictment.

13 Why Counts 34 and 36 must be stricken is because those
14 counts duplicitously charge both Former President Trump and
15 Mr. Nauta. Although citing the same criminal statute, they
16 allege different acts as to each of those defendants. And so
17 with respect to Count 34, the indictment reads: "Trump
18 attempted to persuade Trump Attorney 1 to hide and conceal
19 documents from a federal grand jury."

20 There is no dispute that that allegation does not apply
21 to Mr. Nauta. That allegation is an allegation of a violation
22 of 1512 (b) (2) (A) .

23 Two: "Trump and Nauta misled Trump Attorney 1 by
24 moving boxes that contained documents with classified markings
25 so that Trump Attorney 1 would not find the documents and

1 produce them to a federal grand jury." Again, that is an
2 allegation as to both Trump and Nauta of a violation as to
3 1512(b) (2) (A) .

4 Had the indictment charged paragraph -- subparagraph 1
5 separately from subparagraph 2 in separate counts, I don't
6 think that the argument that we're making would apply. But
7 here, they have grouped together two separate acts and charged
8 them as against Mr. Nauta.

9 There is no -- the Special Counsel's Office cites no
10 law that permits them to duplicitously charge multiple acts in
11 a single count in the way this is done. Rule 8 doesn't even
12 read remotely close to what they suggest is permissible.

13 Count 36 is the same: "Trump and Nauta hid, concealed,
14 and covered up from the FBI Trump's continued possession of
15 documents." If that's all Count 36 said, then the indictment
16 would be properly pled. But it goes on: "Trump caused a false
17 certification to be submitted to the FBI." That has nothing to
18 do with Mr. Nauta. It is -- it is charging a separate act
19 under 1519 and alleging it as against Mr. Nauta. So -- so
20 Count 36 is improperly pled.

21 Why does it matter? The Special Counsel's Office
22 suggests that we can craft a jury instruction that would
23 allow --

24 THE COURT: Before you move on to the "why does it
25 matter," on 36, what is the false -- does that require a false

1 entry as to both defendants?

2 MR. WOODWARD: "Trump caused a false certification to
3 be submitted to the FBI." I don't know. I mean, I think --

4 THE COURT: Is there a false entry alleged vis-à-vis
5 Mr. Nauta?

6 MR. WOODWARD: No, Your Honor.

7 THE COURT: Does count -- does the charge in Count 36
8 require there to be a false entry in any record or document?

9 MR. WOODWARD: Yes, it does. "Trump caused a
10 false -- a false certification to be submitted to the FBI."

11 THE COURT: That's what I'm asking, on the statutory
12 text of 1519.

13 MR. WOODWARD: Does not. 1519 does not require the
14 government to allege --

15 THE COURT: It says, "Whoever knowingly alters,
16 destroys, mutilates, conceals, covers up, falsifies, or makes a
17 false entry in any record."

18 So my question is: Does there need to be a false entry
19 in a record for a 1519 charge?

20 MR. WOODWARD: No. I mean, maybe I'm -- maybe
21 I'm -- maybe I'm wrong about that.

22 THE COURT: No, no, no. I'm not suggesting that you
23 are. So there is -- there's no false entry requirement?

24 MR. WOODWARD: Not if the allegation is that materials
25 are altered, destroyed, mutilated, concealed, covered up,

1 period.

2 THE COURT: Okay.

3 MR. WOODWARD: There are -- 1519 makes out various ways
4 in which the crime can be committed.

5 THE COURT: Okay. So your issue here is -- is that
6 this should have been broken up into two counts.

7 MR. WOODWARD: It should have been broken up into two
8 counts, and because it was not, it violates the plain language
9 of Rule 8. And it has to be dismissed because we cannot be
10 sure that the grand jury could have returned an indictment,
11 making out the allegations of Counts 36, without a claim that
12 Trump caused a false certification to be submitted to the FBI.

13 Because of the way in which it was presented to the
14 grand jury, we do not know what import the grand jury
15 attributed to that last sentence, which does not apply to
16 Mr. Nauta. He is not alleged to have caused a false
17 certification to be submitted to the FBI. And so 34 and 36
18 are, on their face, duplicitious, in that multiple crimes are
19 alleged in the same counts that should have been pleaded
20 separately.

21 THE COURT: Are you aware of any other indictments
22 where you have this sort of one crime as to two defendant -- I
23 probably butchered that.

24 But anyhow, are you familiar with any other indictments
25 that employ this pleading format?

1 MR. WOODWARD: I have seen other indictments in which
2 multiple defendants are charged in a single count for all
3 engaging in the same activity.

4 THE COURT: Right. And there are some counts that's in
5 the indictment that do this?

6 MR. WOODWARD: That's correct.

7 THE COURT: Okay.

8 MR. WOODWARD: I have not seen Counts -- to
9 Your Honor's point, Counts 35 and 37 both charge that Mr. Trump
10 and Mr. Nauta were engaged in the same activity, which
11 violated --

12 THE COURT: Okay. So those -- those counts don't have
13 the defect you've -- or the purported defect you've identified?

14 MR. WOODWARD: Those counts do not have that defect.
15 They do suffer from other defects. But 34 and 37, as I say,
16 suffer the strongest defects. The opposition of the Special
17 Counsel's Office simply does not address why we can charge two
18 defendants with different acts in the same count, nor can they
19 rely on the fact that the preceding paragraph simply quotes the
20 text of the statute as -- as the Court has now read from.
21 That -- that doesn't satisfy the pleading requirements where
22 they have gone out of their way to provide a speaking
23 indictment, which is what's happened here.

24 They allege specific acts by Defendants Trump and
25 Nauta; and they're, therefore, required to separately plead

1 those. Otherwise, it is unclear what crimes Mr. Nauta and
2 Former President Trump are defending in discovery, at trial.
3 And crafting a jury instruction simply won't cure that
4 confusion when it comes to the jury's rendering a verdict in
5 this case.

6 Similarly, Count 36 is going to implicate a theme that
7 is persistent throughout the false -- or the improper -- the
8 deficiencies, if you will, of the indictment. Count 36, as I
9 noted, alleges that Trump caused a false certification to be
10 submitted to the FBI. That implicates Count 38.

11 Count 38 alleges that Former President Trump caused
12 Trump Attorney 3 to submit a sworn certification that was
13 false. The problem with the way that the indictment is pleaded
14 is that that certification was not false, and there is no
15 argument to the contrary. When Trump Attorney --

16 THE COURT: What about -- what about Title 18, United
17 States Code, Section 2?

18 MR. WOODWARD: If the statement itself is true, then an
19 individual cannot be alleged to have aided and abetted an act
20 that is not a crime. Because Trump Attorney 3's statement was
21 accurate as to Trump Attorney 3, a separate individual cannot
22 be alleged to have aided and abetted Trump Attorney 3 in
23 affecting that crime.

24 THE COURT: So is -- but is the argument that if Trump
25 had signed the certification, then it would have been subject

1 to criminal prohibition and, therefore, so long as he's
2 conceived of as the principal in that count, then it would be
3 okay?

4 MR. WOODWARD: Well, that would be a different
5 argument, certainly. If the argument by the Special Counsel's
6 Office was that Trump either signed or adopted the statement of
7 Trump Attorney 3, that then it's his -- yes, that he is now the
8 principal under 1001 liability, and the statement may be false
9 as to him. But that, again, is not how the indictment is
10 pleaded.

11 It's pleaded as Former President Trump causing Trump
12 Attorney 3 to sign a statement that it is undisputed was true
13 as to Trump Attorney 3.

14 THE COURT: 1001 does not have the cause language.
15 It's just "making."

16 MR. WOODWARD: Correct.

17 THE COURT: So you need Title 18, United States Code,
18 Section 2 to -- for that causation language.

19 MR. WOODWARD: I think that's right, Your Honor. But
20 the case law is clear that where the -- and I think the cite to
21 that is -- bear with me.

22 The -- the case law is clear that you cannot aid and
23 abet an individual in committing an otherwise lawful act.

24 THE COURT: Okay. All right.

25 Anything further on Counts 34 and 36 and 38?

1 MR. WOODWARD: Yes, Your Honor.

2 So once we accept the proposition that the statement by
3 Trump Attorney 3 is, in fact, true and, therefore, not -- not
4 a -- not a violation of law, we can then strike those
5 allegations from Count 33.

6 So, obviously, Count 33, paragraph 97 --

7 THE COURT: Why would that be the natural consequence?

8 MR. WOODWARD: Because Count 33, paragraph 97,
9 subparagraph E, provides that as means and manner of the
10 conspiracy, they caused a false certification to be submitted
11 to the FBI and grand jury, representing that all documents with
12 classification markings had been produced. That's not, in
13 fact, what was done.

14 The statement -- the certification by Trump Attorney 3,
15 again, was accurate as to Trump Attorney 3.

16 THE COURT: Well, even if -- even if you're correct on
17 the purported pleading deficiency as to Count 38 for purposes
18 of 1001, why would that necessarily take that conduct off the
19 table for purposes of the conspiracy charge?

20 MR. WOODWARD: Because it's -- it's not a criminal act
21 in furtherance of a conspiracy.

22 THE COURT: And it's, in your view, not criminal
23 because as to Trump Attorney 3, it wasn't false?

24 MR. WOODWARD: That's correct.

25 THE COURT: Okay.

1 MR. WOODWARD: That's correct. Trump -- Trump
2 Attorney 3 believed the certification -- oh, that's a good
3 point of clarification, but I will finish my thought.

4 Trump Attorney 3 signed a certification that provided
5 that any and all documents accompanying this
6 certification -- excuse me -- that a diligent search was
7 conducted of the boxes that were moved from the White House to
8 Florida; that the search was conducted after receipt of the
9 subpoena, et cetera; and any and all responsive documents
10 accompanied the certification. She believed that to be true at
11 the time that she provided the certification.

12 Your Honor, I -- I neglected to attach the
13 certification in our submission of the reply. I have a copy
14 here today that I can pass up to the Court, and then I can file
15 that on the docket on my way back to --

16 THE COURT: Sure. I will receive that.

17 MR. WOODWARD: I will --

18 THE COURT: Again, this whole motion, though, is bound
19 by the allegations of the -- of the superseding indictment.

20 MR. WOODWARD: That's correct, Your Honor.

21 THE COURT: Okay.

22 MR. WOODWARD: That's correct. We reference it only
23 for --

24 THE COURT: Mr. Harbach, can you just try to keep it
25 down so it's not distracting.

1 MR. HARBACH: Yes, Your Honor. I'm sorry.

2 THE COURT: Thank you.

3 MR. WOODWARD: May I approach, Your Honor?

4 THE COURT: Yes.

5 MR. WOODWARD: I will note that this version is -- is
6 unredacted. I have already conferred with the Special
7 Counsel's Office about the submission of a redacted version
8 that removes PII and reference to the individuals. And so we
9 will file both. One under seal -- with the Court's permission,
10 one under seal and one on the public docket.

11 THE COURT: Any objection? Hold on.

12 Any objection?

13 MR. BRATT: No, Your Honor. We already conveyed that
14 to Mr. Woodward.

15 THE COURT: Okay. Then make sure to do that,
16 Mr. Woodward, by this Friday.

17 MR. WOODWARD: Understood, Your Honor.

18 All right. So with respect to -- well, I --

19 THE COURT: Before you keep going, are any other
20 defense attorneys wishing to be heard on this motion today?

21 MR. BLANCHE: No, Your Honor.

22 MR. MURRELL: No, ma'am.

23 THE COURT: All right. Anything more on Counts 34, 36,
24 or 38?

25 MR. WOODWARD: I don't think so, Your Honor.

1 THE COURT: Okay. Well, then just so we don't get too
2 down the path without a chance to at least isolate some counts
3 in segments, then let me hear from the Special Counsel's Office
4 just for these three counts.

5 MR. WOODWARD: Of course, Your Honor.

6 THE COURT: Let's start with Count 38, which is where
7 we just finished with Mr. Woodward.

8 MR. BRATT: So, Your Honor, we in no way concede that
9 the certification is true. That is a jury issue, and that
10 should really end the inquiry right there.

11 THE COURT: Right. But I'm just looking at the way
12 this is pled. It says: "The statements and representations
13 set forth above were false as Trump knew."

14 MR. BRATT: Correct.

15 THE COURT: And then it talks about Trump causing
16 the --

17 MR. BRATT: Right.

18 THE COURT: -- certification to be made. And I'm just
19 trying to understand from a pure pleading perspective how
20 this -- how this shakes out in light of the text of -- of 1001
21 which does not contain the causation language.

22 MR. BRATT: 18 U.S.C., Section 2(b) does.

23 THE COURT: Okay. So that's my argument, is, can you
24 explain to me your theory for how one would, I guess, abet?

25 MR. BRATT: It's not abetting. This is the causing

1 prong of, 18 U.S.C., Section 2.

2 THE COURT: Right. So you're not relying on an aiding
3 and abetting theory. The argument, as I take it, is that Trump
4 is the principal. He is liable even if he didn't cause -- if
5 he didn't make the certification, because he caused it.

6 MR. BRATT: Correct. And that's why, in paragraph 107,
7 we allege caused.

8 THE COURT: And you don't see any issue in the case law
9 with there being -- with there being, I guess, no falsity, at
10 least as alleged for the attorney who signed the certification?

11 MR. BRATT: So we view the attorney who signed it as
12 the conduit by which the false information was conveyed to the
13 government and, ultimately, to the -- to the grand jury. So
14 what the chain of events is: Trump Attorney 1 conveys
15 information to Trump Attorney 2. That that information is
16 information that Trump Attorney 1 believes to be correct.
17 Trump Attorney 1 believes that to be correct because Trump,
18 unbeknownst, did not reveal to him that boxes were removed from
19 the storage room before Trump Attorney 1 had the
20 opportunity -- or went in there to review them.

21 So -- and, you know, this is, again, this is partly why
22 it's a jury issue, but we expect that -- there to be testimony
23 at trial -- again, some of this contingent on the Court's
24 ruling on crime fraud -- but testimony at trial that the
25 importance of the certification was discussed with Former

1 President Trump.

2 So all this evidence lines up to, again, prove the
3 falsity, which is a jury issue, but in terms of the way this is
4 pled, it is pled entirely correctly.

5 THE COURT: All right. But just to be clear, the
6 falsity is alleged as to Trump --

7 MR. BRATT: Correct.

8 THE COURT: -- not the person who made the
9 certification?

10 MR. BRATT: Correct.

11 THE COURT: But it's still okay in your view because of
12 the Section 2(b)?

13 MR. BRATT: Yes, that's correct.

14 THE COURT: All right. Now, there is a citation to
15 Hendricks, a Fifth Circuit case from the '60s. Does that have
16 any bearing on this discussion? The parenthetical in the reply
17 is, quote, "Jury must still find the offense to have been
18 committed by a principal and that the principal was aided or
19 abetted by the accused."

20 MR. BRATT: So, again, I -- I think -- don't want to
21 confuse 2(a) with 2(b) and what the Court will instruct -- and,
22 you know, I don't have --

23 THE COURT: So is your argument that Hendricks is about
24 2(a)?

25 MR. BRATT: Correct.

1 THE COURT: Okay.

2 MR. BRATT: Correct.

3 THE COURT: Mr. Woodward, do you have anything else to
4 add on Hendricks? Because that does seem to be an aiding and
5 abetting case, not a Section 2(b) case. And we've now heard
6 that the way this is -- is supported is via the (b) route.

7 MR. WOODWARD: That's not what is alleged in the
8 indictment.

9 THE COURT: Well, there is no -- there is no
10 qualification on Section 2 as pled. It just says, 18, U.S.C.,
11 Section 2.

12 MR. BRATT: And, Your Honor, I would add that under the
13 law, there is no requirement for us to even cite Section 2.
14 Aiding and abetting is a theory of liability.

15 THE COURT: I thought you said you weren't doing aiding
16 and abetting.

17 MR. BRATT: 18, U.S.C., Section 2, aiding and
18 abetting/causation is a theory of liability, it's not a
19 substantive offense. The circuits have uniformly held that we
20 don't even have to set it out in the indictment. We have.

21 THE COURT: Okay. But you would agree that without the
22 (b), this wouldn't track 1001 by itself?

23 MR. BRATT: That is not our theory here, correct.

24 THE COURT: Okay. All right. Then let's turn to the
25 other counts, Mr. Bratt.

1 MR. BRATT: Sure.

2 So for Counts 34 and 36, a couple of -- a couple of
3 things. First of all, we didn't have to charge it in this way.
4 We set out in the counts the manner by which the defendants
5 committed the offense. These were all part of the same series
6 of transactions or, really, one transaction, that occurred over
7 the span of a couple of days. And under Rule 8(b) the
8 defendants are properly joined together. Our principal
9 authority is the Felts case that we cite in our opposition. In
10 Felts, the Eleventh Circuit held, again, consistent with other
11 circuits, that if a statute delineates different ways in which
12 it can be violated, you know, through subsections or otherwise,
13 that it is not duplicitous to include in one count the
14 different ways in which it is --

15 THE COURT: That, I don't -- I think that's well
16 settled. But I think the issue here is you have in one count
17 that starts off as to two defendants, breaking it out in terms
18 of actual conduct within that very same count. It's a little
19 bit unusual. I'm not -- I'm not -- I don't see this very
20 often. I see -- I see the format you employ in Count 35 and in
21 37. But the 34 and 36 technique of having, sort of, within one
22 count conduct as to two defendants in one segment, and then
23 conduct as to one defendant only in one segment, is that not
24 more confusing in the end --

25 MR. BRATT: No.

1 THE COURT: -- in terms of breaking this out element by
2 element?

3 MR. BRATT: So, no, I don't think it is. I will also
4 add, Your Honor, that we're not at this point, but we would
5 likely request a Pinkerton instruction so that Mr. Nauta, under
6 Pinkerton theory, has liability as a coconspirator with
7 Defendant Trump for Defendant Trump's actions in this count.
8 So they are properly joined together. Mr. Nauta can be held
9 responsible for the activities that Mr. Trump did on his own.
10 They cite no case that says that this type of, what really is,
11 extra notice pleading renders the count duplicitous.

12 THE COURT: So if you were to just break out and just
13 say to me, okay, what are the elements vis-à-vis Mr. Trump on
14 Count 34, and what are the elements for Mr. Nauta on Count 34,
15 what would they be?

16 MR. BRATT: So I would -- the elements are the same as
17 to both. The question is, what is the proof as to them? And
18 the proof as to them is, in one manner, slightly different;
19 that is, that as to Count 34, the former president first tried
20 to persuade his former attorney not to turn over documents. So
21 that's part of the proof. Again, as a coconspirator of Former
22 President Trump, under Pinkerton Mr. Nauta has liability for
23 that under this count.

24 THE COURT: Okay. But you're -- you're now picking up
25 conspiracy liability, and I'm looking at 34. So now I guess

1 you are saying we have to look at 33?

2 MR. BRATT: 33, yeah. I mean, 33 would give us the
3 basis for a Pinkerton instruction as to 34.

4 THE COURT: But would that then just convert all the
5 other counts into conspiracies in a way?

6 MR. BRATT: No. But it is not uncommon. And this is
7 something that is done routinely and, perhaps, not without the
8 same level of detail that we included here. But coconspirators
9 are often included in a count. Properly so, under Rule 8(b),
10 coconspirators are often properly included in a count on a
11 Pinkerton theory for actions that are only taken by a different
12 coconspirator.

13 THE COURT: Okay. But this is not a conspiracy charge;
14 33 is.

15 MR. BRATT: But the question is, is this a proper
16 charge? Is it duplicitous? They cite no case law that would
17 indicate that this is duplicitous. That's their basis for
18 striking it. And even -- even under the case law --

19 THE COURT: Okay. But just, like, if you were trying
20 to understand the elements --

21 MR. BRATT: Yes.

22 THE COURT: Okay. You have -- you have two offenses.

23 MR. BRATT: It's one offense.

24 THE COURT: One is as to one defendant, one is as to
25 two in one count. How would you break out the elements? Would

1 there not be a need, then, for a special interrogatory that
2 requires the jury to answer which defendant did what vis-à-vis
3 34?

4 MR. BRATT: So, again, given my familiarity, at least
5 with what the law requires for a special interrogatory, I don't
6 think so. But that certainly is something the Court could take
7 up at the instruction.

8 THE COURT: So if we were to have that discussion, what
9 kind of separate questions could you envision for Count 34,
10 just looking at Count 34?

11 MR. BRATT: And I don't want to be held to this since
12 I'm just speaking off-the-cuff --

13 THE COURT: That's fine.

14 MR. BRATT: But one could be, does the jury find beyond
15 a reasonable doubt that Defendant Trump violated Count 34 by
16 attempting to persuade Trump Attorney 1 to hide and conceal
17 documents? Did -- you know, 2, did -- and then the second
18 language incorporating the second one.

19 THE COURT: So maybe there would be three total
20 questions.

21 MR. BRATT: And I guess the third one could be -- but
22 it would be highly unusual in a Pinkerton setting, but a third
23 one could be: Was this activity in the first part by Former
24 President Trump foreseeable to Mr. Nauta?

25 But in terms of pleading --

1 THE COURT: What authority do you have for a Pinkerton
2 instruction on non-conspiracy counts?

3 MR. BRATT: But that's what every -- every
4 substantive --

5 THE COURT: I'm just asking. What authority?

6 MR. BRATT: So the authority is Pinkerton. Pinkerton
7 says that if you are a member of a conspiracy, you can be held
8 liable for any substantive count that is reasonably foreseeable
9 as part of the conspiracy.

10 THE COURT: I would agree with you, for sure, as to
11 Counts 33. I'm just not sure that it then sort of bleeds into
12 every other substantive count that's not a conspiracy.

13 MR. BRATT: But that's Pinkerton, Your Honor.

14 THE COURT: Okay.

15 MR. BRATT: Pinkerton allows the government to charge
16 and a jury to find a defendant -- a coconspirator guilty for
17 any substantive offense that is reasonably foreseeable within
18 the scope of the conspiracy.

19 We can obviously brief it later --

20 THE COURT: All right. Mr. Nauta is not described in
21 Count 34 as a coconspirator, but I take your point that if you
22 find liability on 33, then you would reach that conclusion.
23 So, okay.

24 All right. Can you point the Court to any other
25 examples of pleading where you have had this structure,

1 Mr. Bratt?

2 MR. BRATT: I can't think of one offhand in my
3 experience. But, again, looking at cases like Felts, looking
4 at --

5 THE COURT: So Felts says you can do this exact
6 formulation?

7 MR. BRATT: Felts -- Felts says that if there
8 are -- are different ways of violating a statute that is not
9 duplicitous to include in a count charging that statute, the
10 different manner -- ways in which a defendant can --

11 THE COURT: That's different, though. That's the
12 well-established principle that you can charge in the
13 conjunctive when you have multiple means of violating a
14 statute. But what I'm hearing in the papers is that this is,
15 sort of, a different flavor; that this is putting different
16 acts in one count, some applicable to two defendants, and some
17 applicable to one only.

18 Why not just separate the counts so that there is no
19 confusion?

20 MR. BRATT: And I think if we had done that, we would
21 have seen a multiplicity motion.

22 And, really, we could have just ended the sentence at
23 "official proceeding" and not delineate the ways in which the
24 defendants violated the statute. That was not a requirement
25 for -- for how we charged this. But we did provide some

1 additional --

2 THE COURT: So you could have charged this without
3 identifying at all what the misleading conduct is?

4 MR. BRATT: Yes. Yes. They made them sign a bill of
5 particulars on that.

6 THE COURT: Okay. And then you would have opposed
7 that, I'm sure.

8 At that point, then, there would have been no
9 understanding of what of purported misleading conduct is.

10 MR. BRATT: Well, I would -- again, and this would
11 be --

12 THE COURT: Other than the general allegations, which
13 are, I guess, 90 -- 90 -- one paragraph.

14 All right. So Felts is your authority for this
15 technique of putting --

16 MR. BRATT: Felts and Pinkerton for why it is
17 appropriate for Mr. Nauta to be in this count.

18 THE COURT: Pinkerton speaks about pleading?

19 MR. BRATT: Pinkerton speaks about liability. And if a
20 defendant has Pinkerton liability, it is -- it is appropriate
21 to include the defendant under Rule 8(b) as part of the same
22 series and transaction in a count with another co-defendant.

23 THE COURT: Okay. So these arguments that you've made,
24 they apply equally to Count 36?

25 MR. BRATT: Yes.

1 THE COURT: Okay. As far as that false entry question
2 that I had, do you agree with Mr. Woodward that Section 1519
3 does not require an actual false entry?

4 MR. BRATT: I'm not quite -- I mean, we quoted the
5 statutory language. False entry is in the statutory language.
6 And obviously, we cite different ways by which, here, that the
7 statute was violated --

8 THE COURT: Uh-huh.

9 MR. BRATT: -- by concealing, removing, et cetera.
10 So -- but we do include false entry as one of them, obviously
11 referring to the certification.

12 THE COURT: But -- but what I'm saying is: Is there a
13 false entry as to Mr. Nauta for Count 36?

14 MR. BRATT: Not that he personally committed, no. And,
15 again, the allegation is that Trump caused the false
16 certification to be submitted to the FBI.

17 THE COURT: Okay. But your reading of 1519 is that you
18 don't actually need a false entry to make out such an offense?

19 MR. BRATT: Given what else is alleged here, I would
20 say that's correct, yes.

21 THE COURT: Okay.

22 MR. BRATT: But we do believe we have a false entry.

23 THE COURT: The certification?

24 MR. BRATT: Correct.

25 THE COURT: But that one doesn't apply to Mr. Nauta?

1 MR. BRATT: Not as the person who committed it. As a
2 coconspirator, he would have liability for it.

3 THE COURT: Okay. All right. Okay. Then let me allow
4 Mr. Woodward to just respond to the arguments on these three
5 counts, and then we'll turn to the other counts.

6 MR. WOODWARD: All right. With respect to -- I think,
7 Your Honor, taking this back to sort of what -- what is
8 required. We -- Rule 8(b) provides that an indictment may
9 charge two or more defendants if they are alleged to have
10 participated in the same act or transaction or in the same
11 series of acts or transactions constituting an offense or
12 offenses.

13 What I -- what I hear the Special Counsel's Office to
14 be alleging is that they could have pleaded Count 34, for
15 example, ending before paragraph 2. So they -- they could have
16 pleaded "Donald J. Trump and Waltine Nauta did knowingly
17 engage...Trump attempted to persuade Trump Attorney 1 to hide
18 and conceal documents from a federal grand jury." And that --
19 they could have pleaded it that way because, when it came time
20 for jury instructions, they would then be permitted to request
21 that the Court instruct the jury on a Pinkerton theory of
22 liability; that is, that Mr. Nauta conspired with Trump to
23 attempt to persuade Trump Attorney 1.

24 But I think that takes Pinkerton liability, which,
25 incidentally, is not in their opposition, and it puts it on its

1 head. I mean, the purpose here is for Mr. Nauta to be put on
2 notice of the acts with which he has been charged.

3 And to say that Mr. Trump -- excuse me -- to say that
4 Mr. Nauta has been charged with Mr. Trump attempting to
5 persuade Trump Attorney 1 to hide and conceal documents from a
6 federal grand jury does not do that. That misconstrues
7 Rule 8(b) which allows multiple defendants to be included in a
8 count alleging a criminal act.

9 What they've done here, without citing any example of
10 this ever having occurred before, is combine two separate
11 crimes and claimed that that satisfies Rule 8(b) because, at
12 jury instructions, this Court might -- might -- allow for a
13 Pinkerton theory of liability to be included in the jury
14 instructions. But until --

15 THE COURT: Well, but then they say: Well, we could do
16 some special interrogatories and break it out that way to avoid
17 confusion.

18 MR. WOODWARD: I don't believe they have a right to
19 special interrogatories. Again, this is all -- this all
20 depends on a fair amount of assumptions on how the trial
21 shakes and how the evidence shakes out at trial, and what this
22 Court permits with respect to jury instructions.

23 On its face, on its face, the indictment is confusing
24 and prejudicial to Mr. Nauta, who is required to be put on
25 notice --

1 THE COURT: Okay. But on the notice point, I mean, the
2 notice is in the form of subsection 2 to Count 34. That's the
3 factual conduct that is the subject of Count 34 in the
4 alleged -- in the allegations. Is there really an absence of
5 notice?

6 MR. WOODWARD: There is. Because we're now learning
7 that they're -- they're going to allege that Mr. Nauta
8 conspired with Mr. Trump to persuade Trump Attorney 1, and that
9 under Count 34, he is separately liable for that act, in
10 violation of 1512(b)(2)(A). That's not what the indictment
11 says.

12 THE COURT: Okay. But taking Pinkerton off the table
13 for just a moment, it's still the case that this states the
14 factual conduct in subsection 2. So why wouldn't that be
15 enough notice for you to be able to defend against the charge?

16 MR. WOODWARD: Because he is required to also defend
17 against Trump attempting to persuade Trump Attorney 1 to hide
18 and conceal. We can't ignore that sentence of the indictment
19 when it comes to Mr. Nauta. That's the whole purpose of Rule 7
20 and Rule 8 combined. There needs to be a plain, concise
21 statement of the facts, and they've combined them here.

22 THE COURT: But they say that if they had separated
23 out, then there would have been a multiplicity challenge.

24 MR. WOODWARD: We'll see.

25 THE COURT: So, then, is it really just a dispute --

1 MR. WOODWARD: That's not the issue before the Court.
2 I mean, we can't hypothetically suggest that you would grant a
3 multiplicity challenge simply because they've -- they've pled
4 those separately. We can't assume that a multiplicity
5 challenge would be brought.

6 We're -- we're talking in hypotheticals when all -- all
7 of this Court is required to do is examine the four corners of
8 the indictment; they have made that quite clear.

9 THE COURT: Okay. What is your argument on Felts?

10 MR. WOODWARD: I think they're requiring us to assume
11 Pinkerton liability for Felts to apply. This is not pleading
12 the same -- a violation of the same statute in the alternative
13 as to Mr. Nauta. This is pleading the same statute in the
14 alternative as to Former President Trump. And then Mr. Nauta
15 is -- is guilty by virtue of having participated in the
16 conspiracy not alleged in this count.

17 THE COURT: Okay. So if you were to crystallize the
18 alleged prejudice that your client faces by virtue of the
19 pleading format in Count 34, what would it be?

20 MR. WOODWARD: That Mr. Nauta is not sufficiently put
21 on notice of how he is criminally liable for President Trump
22 attempting to persuade Trump Attorney 1 to hide and conceal
23 documents from a federal grand jury.

24 THE COURT: Okay. All right. Okay. Let's -- anything
25 further on Count 34? And then Count 36, I think, is similarly

1 situated.

2 MR. WOODWARD: No, Your Honor. We -- we agree, and we
3 would just say that -- you know, I'm not sure that Felts stands
4 for the proposition either that Former President Trump can be
5 charged with two different acts in the way that he was here.
6 If -- if this -- even if -- I don't think you can simply
7 scratch Nauta and have a sufficient indictment because the
8 primary argument would be "we don't know what the grand jury
9 would have done."

10 But I also think that this is not a true reading of
11 Felts in Count 34; that they can simply allege two very
12 different acts, persuading an attorney to hide or conceal
13 documents and then moving boxes.

14 THE COURT: Well, Count 34, both of those subsections
15 concern the attorney in some degree.

16 But anyhow, what is your argument, if any, on the
17 Count 38 issue, which Mr. Bratt has explained, pursuant to
18 Section 2(b) would be under the causation prong and, therefore,
19 there is no issue?

20 MR. WOODWARD: Your Honor, that, again, was not clear
21 from the papers. It would seem to us -- let me just pull up,
22 18 U.S.C., 2.

23 THE COURT: Okay. Well, I don't want to have you do
24 legal research on the fly. So let's just potentially consider
25 any supplemental authority you wish on just that one Count 38

1 issue. But it appears that Mr. Bratt's reading of that statute
2 would permit the method of pleading for Count 38.

3 MR. WOODWARD: Very good, Your Honor.

4 THE COURT: Okay.

5 MR. WOODWARD: I'm happy to turn to the --

6 THE COURT: I have one question for the Special Counsel
7 before we move on to the other counts, and that's for
8 Mr. Bratt.

9 For Count 34, can you explain to me what "knowingly
10 corruptly" means? This says, "Did knowingly engage in
11 misleading conduct toward another person and knowingly
12 corruptly persuade."

13 MR. BRATT: Correct. So that tracks the statutory
14 language.

15 THE COURT: But can you just help me walk through the
16 statutory language with the multiple mens reas overlaid upon
17 one another? It gets a little confusing.

18 And, of course, this all assumes that we know what
19 "corruptly" means.

20 MR. BRATT: That's what I was just about to say,
21 Your Honor, that --

22 THE COURT: Okay.

23 MR. BRATT: -- this kind of leads back to I know what
24 has been an ongoing discussion between the parties and the
25 Court about what "corruptly" means, and maybe the Supreme Court

1 will give some clarity to it in Fischer, maybe not. That's
2 hard to tell. But --

3 THE COURT: Okay. I'm looking at 15(b)(2)(a).

4 MR. BRATT: Yes. So the first prong is: "Knowingly
5 engage in misleading conduct toward another person."
6 Knowingly --

7 THE COURT: But I'm just looking at the statutory text.
8 I have "whoever knowingly."

9 MR. BRATT: Right.

10 THE COURT: I'm trying to isolate what would be the
11 elements for this count.

12 MR. BRATT: So, for this count, it would be,
13 "knowingly" -- the Court will define elsewhere.

14 THE COURT: Okay.

15 MR. BRATT: There is a standard instruction on that,
16 and it's usually something that is done, you know, with --

17 THE COURT: Yes, I know.

18 MR. BRATT: -- with knowledge.

19 "Corruptly" --

20 THE COURT: So we jump from "knowingly," but then where
21 do we go in the statute? "Knowingly," and then we skip over --

22 MR. BRATT: Hold on. I'm sorry.

23 THE COURT: -- the intermediate portion of...

24 MR. BRATT: All right.

25 THE COURT: I was trying to do this yesterday, actually

1 breaking it out, and it's really not as easy as you think.

2 MR. BRATT: I'm not looking at anything at the moment,
3 other than why my notes are not consistent with what I'm
4 reading in the text. I thought I had digested each of the...

5 THE COURT: All right. Maybe you could -- maybe it
6 would be useful for there to be some sort of element-by-element
7 recitation of these counts with potential special
8 interrogatories so that it's understandable what is going to
9 which defendant on the counts that are pled in this, sort of,
10 hybrid format, but I -- I'm going to consider that possibility.

11 So it just was -- it was hard for me to understand what
12 "knowingly corruptly" meant, and then trying to make sense of
13 the statutory language as pled in this count.

14 Anything else on that topic, Mr. Bratt?

15 MR. BRATT: No, Your Honor.

16 THE COURT: Okay. All right. Then, Mr. Woodward,
17 let's get back to the indictment and to the various challenges
18 you have in the motion.

19 MR. WOODWARD: Your Honor, we, of course, have
20 separately challenged the constitutional vagueness of use of
21 "corruptly" in Counts 35 and Counts 37. That's not, however,
22 our principal arguments in this brief. Grouping together
23 Counts 35 and 37, we -- we argue that there are several
24 pleading deficiencies with respect to each.

25 The counts fail to show -- or the indictment, rather,

1 fail to show knowing concealment by Mr. Nauta. They fail to
2 allege a proceeding that is official within the definition of
3 the statute. They fail to allege a proceeding that is subject
4 to the jurisdictional requirements of the statute. And
5 they -- they fail to show any knowledge by Mr. Nauta that the
6 boxes in question contain documents with classification
7 markings that are being hidden from the grand jury or that
8 Mr. Nauta himself is aware of the grand jury.

9 And so, absent specific allegations of Mr. Nauta's
10 knowledge with respect to those elements of the offenses, both
11 Counts 35 and 37 fail to put him on notice of the acts with
12 which he's alleged to have committed. We -- you know, I won't
13 belabor the arguments that we presented with respect to a bill
14 of particulars, but there are -- there is some commonality
15 here.

16 Mr. Nauta cannot know what crimes he is to have
17 committed based on the way that this indictment is drafted. It
18 is confusing. And separately charging these substantive
19 obstruction counts in 35 and in 37, a scheme to conceal,
20 unnecessarily complicates the requirement that he have notice
21 of the offenses with which he is charged.

22 I think the exercise that the Court engaged in with the
23 Special Counsel's Office is instructive. I mean, I -- I think
24 understanding exactly how this would be presented to a jury, or
25 struggling with how to understand this would be presented to a

1 jury overlooks a fundamental problem with the indictment
2 itself, which is, if we look at the four corners of the
3 indictment, do we understand exactly how these claims are made
4 out? And the answer is we don't. We have to have a charging
5 conference to understand that. And that's not what Rule 7 and
6 8 contemplate, a clear and concise statement of facts.

7 THE COURT: Well, there are a lot of alleged facts in
8 the first 91 paragraphs. The question is trying to figure out
9 which ones apply to which counts, and then trying to understand
10 how the counts are different.

11 MR. WOODWARD: Well, and, sure enough, Rule 7 permits
12 the adoption of allegations contained elsewhere in an
13 indictment. But it -- it does not sanction a shotgun pleading
14 which is what this is. Now, the Special Counsel's Office says
15 that there is not case law to support our theory with respect
16 to a criminal indictment, that that shotgun pleading has been
17 precluded only in the context of civil indictments. Yet as
18 we -- as we make reference in our -- on our reply brief,
19 actually, the same -- the same theories that give rise to
20 precluding a shotgun pleading in a civil context apply equally
21 in the criminal context. The rule is the same in civil court
22 as it is in criminal court.

23 And so, you know, the Special Counsel's Office is
24 correct; they didn't need to bring a speaking indictment in
25 this case, but they did. And that's their prerogative. And

1 now they're stuck with the complications that arise from
2 pleading the case in this way, and that -- that should not be
3 to the detriment of these defendants. They are entitled to a
4 well-pleaded indictment. And that's not what we have here. It
5 is confusing.

6 THE COURT: Okay. I get it. I understand your general
7 concerns. But just drilling down into Counts 35 and Count 37,
8 what are -- what do you say are the specific issues, if any?

9 MR. WOODWARD: How did Mr. Nauta conceal boxes? How
10 did Mr. Nauta know that they --

11 THE COURT: But those are all sort of questions for the
12 trier of fact to develop at trial. What is wrong, from a
13 pleading perspective, in your view?

14 MR. WOODWARD: Because, as Your Honor pointed out, the
15 elements of the offense required knowledge -- allegations of
16 knowledge of these things. We can't simply say that he -- that
17 he concealed boxes, that he -- that they contained documents
18 with classification markings, and -- and not provide any
19 explanation for why that's true, not when we engage in a
20 speaking indictment process like we did here, where we have
21 voluntarily undertaken to fulfill, to provide 90 or a hundred
22 and whatever counts. Then it becomes incumbent to assist
23 Mr. Nauta and his co-defendants in understanding exactly what
24 crimes they're alleged to have committed.

25 THE COURT: Okay. So I think what I heard you say was

1 that because there is no allegation in the indictment that
2 Mr. Nauta knew that the boxes contained documents with
3 classification markings, that it doesn't state an offense.
4 What exactly are you saying?

5 MR. WOODWARD: How can he have corruptly concealed a
6 record with the -- with the intent to impair the object's
7 integrity and availability for use of an official proceeding
8 without any knowledge of what was in the box at all?

9 THE COURT: Well, does it matter whether he knew what
10 was in the boxes or whether he knew that what was in the boxes
11 was the subject of the subpoena? Could it have just been
12 anything else, stickers, and it doesn't really matter
13 whatsoever?

14 MR. WOODWARD: Well, that's -- that's the question,
15 Your Honor. It may not matter or it may --

16 THE COURT: Well, if it doesn't matter, then your
17 knowledge argument fails.

18 MR. WOODWARD: If it doesn't matter what was in the
19 boxes -- because, presumably, the Special Counsel's Office is
20 going to argue that Pinkerton liability means that if he moves
21 the boxes at the direction of a coconspirator for the purpose
22 of aiding that coconspirator in committing another crime,
23 they've satisfied their obligation.

24 But that's not what the indictment says. The
25 indictment says Mr. Nauta hid and concealed boxes that

1 contained documents. But it's not clear as to what he was
2 hiding and concealing because he doesn't know, according to the
3 indictment, what's in the boxes.

4 THE COURT: Okay. What about -- I think you said
5 something about his knowledge or lack of knowledge of the
6 official proceeding. It's correct that he doesn't need to know
7 the specifics of the proceeding; right?

8 MR. WOODWARD: That's correct. But there has to have
9 been an official proceeding that applies under the statute.

10 THE COURT: And there -- there was, as alleged --

11 MR. WOODWARD: As alleged.

12 THE COURT: -- via the grand jury subpoena.

13 MR. WOODWARD: As alleged -- as alleged, the official
14 proceeding was the grand jury's investigation. But we submit
15 that's simply a mischaracterization of what was actually
16 happening here; that that's bootstrapping. And, again, that's
17 implicating the PRA motion that Former President --

18 THE COURT: Okay. But just looking at the pleadings.

19 MR. WOODWARD: Just looking at the pleadings, that is
20 what is alleged, but I don't think that the Court can look at
21 pleadings in such a vacuum, given what we know in the context
22 of the other motions that have been brought.

23 THE COURT: All right. Anything else you want to add
24 on Count 37?

25 MR. WOODWARD: Nor Count 35, Your Honor.

1 THE COURT: That's what we're talking about right now
2 is Counts 35 and 37.

3 MR. WOODWARD: Yeah. No. I think that the -- the
4 arguments apply equally as to Counts 35 and to 37.

5 You know, 37 is somewhat amplified by virtue of the
6 fact that it is a 1001 charge. And it's not clear, again, from
7 the face of the indictment, it's not clear how Mr. Nauta is
8 concealing or otherwise not disclosing information and to whom,
9 right? The general allegations of this superseding indictment
10 are realleged. I suppose the Special Counsel's Office may
11 argue that, in not testifying before the grand jury, that he
12 had moved boxes in the days leading up to Trump Attorney 1's
13 search, that he -- that he concealed information from the grand
14 jury. But that's a speculation that we're making based on the
15 benefit of discovery, and not from the face of the indictment.

16 THE COURT: Okay. Just in terms of -- you make this
17 argument in the motion about just the repeated allegations.
18 Can you explain what you mean? Which counts do you say are
19 functionally the same?

20 MR. WOODWARD: Well, each of the counts, from
21 Counts 34, 35, 36, 37, all allege some combination of
22 concealing, misleading, withholding. I think those
23 verbs -- one of those verbs is in each of the counts
24 referenced.

25 THE COURT: So do you know as a factual matter what is

1 different between 34, 35, 36, and 37?

2 MR. WOODWARD: I don't think there is any difference,
3 as a factual matter, with respect to those counts. I think
4 what the Special Counsel's Office will tell us is that they're
5 not precluded from bringing multiple charges that --

6 THE COURT: For the same -- sorry. I cut you off.

7 MR. WOODWARD: You're welcome to do that, Your Honor.
8 It's --

9 THE COURT: Well, just finish your answer.

10 MR. WOODWARD: That criminalize the same conduct.

11 And that the elements of each of these offenses are
12 different under Blockburger and, therefore, this is not
13 "multiplicitous." You know, you're right. In part and parcel,
14 what we're arguing is that that is an extremely technical
15 reading of these statutes and was not the intent of
16 criminalizing behavior that happened to overlap as between
17 1512(b)(2), (C)(1), 1519, and, of course, 1001.

18 THE COURT: Okay. Thank you.

19 MR. WOODWARD: Yeah.

20 THE COURT: Let me hear from Mr. Bratt on these counts
21 that we've been talking about, 35 and 37, and, also, just my
22 general question about what is different from an elemental
23 standpoint between those four counts, because they look awfully
24 similar.

25 MR. BRATT: I mean, the underlying -- it all arises out

1 of the same underlying conduct, but --

2 THE COURT: Okay. So what -- can you just pinpoint,
3 from an elements perspective, what is different, which word is
4 different? What is making these different, if I were to break
5 out the elements for each of them?

6 MR. BRATT: Right. So in Count 34 there are two
7 different mens reas that could be applicable; one is the
8 engaging in misleading conduct, the other is corruptly
9 persuading or attempting to corruptly persuade. And then there
10 is the different activity that is in the count as to
11 1512(b)2(B).

12 THE COURT: Okay. So then we jump to 35. And now I
13 have the same thing. "Corruptly conceal."

14 MR. BRATT: Corruptly conceal, right, which is again --

15 THE COURT: Is that the same thing as what you just
16 said in 34?

17 MR. BRATT: No. The elements --

18 THE COURT: How is it different?

19 MR. BRATT: The elements are -- are slightly different.

20 THE COURT: But in what way? In what real way that
21 anybody could ever make sense of?

22 MR. BRATT: In the way that the Court will instruct. I
23 mean, the Court will give a 1519 instruction. The Court will
24 give a 1512(b)(2)(A) instruction. The Court will give a
25 1512 --

1 THE COURT: Well, I know you are saying that, but it
2 just -- real people have to decide these issues. And so you're
3 saying knowingly corruptly, corruptly conceal, it's all the
4 same general adverb.

5 MR. BRATT: So I think, then, the Court has a choice.
6 We think we appropriately charged different violations of these
7 statutes. We think that we did not charge them in a
8 duplicitous fashion. And it was entirely appropriate to charge
9 the three -- the three parts of 1512 and the conspiracy part,
10 and to charge 1519, and to charge the 1001 scheme to conceal.

11 THE COURT: Okay.

12 MR. BRATT: They're all -- they are all separate --

13 THE COURT: They are definitely separate statutes. So
14 if you were to just help me understand the elemental
15 difference -- I think what you are saying is it's in the
16 mens rea.

17 MR. BRATT: Well, partially. Because for --
18 "corruptly" applies in -- it applies in all three of the 1512
19 provisions. But also in 1512(b)(2) -- (b)(2)(A), the jury
20 could also find that the person engaged in misleading conduct.
21 So there is a -- there are two different ways that the statute
22 could be violated. So that is a mens rea difference.

23 THE COURT: Okay.

24 MR. BRATT: In terms of 36, you have "knowingly
25 conceal." It does not have the "corruptly" language. So there

1 are some differences in the mens rea. There are some
2 differences in -- once you get beyond the mens rea, the conduct
3 that violates the statute; that is what separates each of these
4 counts.

5 THE COURT: But the conduct that separates the statute,
6 how is that different across the spectrum of four counts?

7 MR. BRATT: So it is described differently in each of
8 the -- each of the counts. So you have, in (b)(2)(A), "Intend
9 to cause and induce a person to withhold a record document or
10 other object." You have, in Count 35, 15(c)(1),
11 "Doing -- doing the act with the intent to impair the object's
12 integrity or availability for use in official proceeding."

13 For Count 36, you have, again, "Conceal, cover up,
14 falsify, make a false entry in a document, record, or tangible
15 object with the intent to impede, obstruct, or influence the
16 investigation and proper administration of any matter within
17 the jurisdiction or department -- or agency of the
18 United States."

19 So those are all different. They're both different
20 mens reas amongst the three statutes, different -- and I'm
21 searching for the right word -- different, sort of, for lack of
22 a better word, object of how that mens rea is being applied.
23 And the conduct that was being -- that that --

24 THE COURT: This seems very similar to me, but I take
25 your point. I mean, we have "attempting to persuade, to hide

1 and conceal docs from a federal grand jury, moving boxes." And
2 then that comes up again, "hiding and concealing boxes that
3 contain documents so attorney wouldn't see and produce." And
4 then the same thing, "hiding and concealing and covering up
5 possession with markings."

6 But, anyhow, I understand your point. These are all
7 separate statutes. They have slightly different mens reas, and
8 so it's all sufficient.

9 MR. BRATT: That's correct, yes.

10 THE COURT: Okay.

11 MR. BRATT: Yes.

12 THE COURT: All right. It's hard. I think it's going
13 to be confusing for somebody to try to really detect what's
14 actually different between these and trying to make sense of
15 the mens reas that overlap significantly, especially given the
16 conduct that is repeated over the course of the four counts.
17 But that will be a project to -- to exercise with care as we
18 proceed further.

19 Let me understand your response to Mr. Woodward's
20 suggestion as to Count 35, that because there is no allegation
21 in the indictment that either of the co-defendants knew that
22 the boxes contained documents with classification markings,
23 that there is a, I guess, a failure to state an offense.

24 MR. BRATT: Correct. And I think we discussed this at
25 the April hearing with respect to Mr. De Oliveira's challenge

1 to, I think it's Count 41.

2 THE COURT: Yes.

3 MR. BRATT: And I think the Court agreed with us that
4 under "Friske" or Friske that what we have to show is that they
5 had knowledge of a proceeding. They don't have to have
6 detailed knowledge of the proceeding, but they have to have
7 knowledge of the proceeding. They do not have to have
8 knowledge that there were documents with classification
9 markings in the boxes. And I think we've established that.

10 THE COURT: Do they have to -- so they don't -- so
11 in -- on your theory, they do not have to have any knowledge
12 that there were documents with markings in the boxes; is that
13 correct?

14 MR. BRATT: That's correct.

15 THE COURT: Okay. And is there any allegation in the
16 indictment that they knew that in the boxes, there were
17 documents with classification markings?

18 MR. BRATT: So we alleged that, at least in one
19 instance, Mr. Nauta came into the storage room and saw a
20 spilled box. And there was a very visible --

21 THE COURT: And when did that -- when did that take
22 place again, allegedly?

23 MR. BRATT: I'm going to have to look in the
24 indictment. That was, I'm going to say, December/January,
25 December 2021, January 2022, in that time frame.

1 Let me just...

2 THE COURT: Okay. So if -- if -- if the theory is they
3 don't need to know at all that there are documents with
4 classification markings in the boxes, then what is the shared
5 unlawful plan for purposes of Count 33?

6 MR. BRATT: The shared unlawful plan is to obstruct --
7 for lack of a better word, to obstruct the investigation.

8 THE COURT: And that has no bearing whatsoever on the
9 existence of classification markings? It could have been
10 anything under the sun?

11 MR. BRATT: As long as we can prove that they were
12 aware that there was a proceeding and that there was a request
13 to subpoena in relation to that proceeding, we don't have to go
14 more granular than that.

15 THE COURT: But then, I guess, the trouble there is
16 that you have a purpose allegation, and then have you a manner
17 and means that picks up on the purpose.

18 MR. BRATT: Yes. And --

19 THE COURT: So you have the purpose of the conspiracy
20 was for Trump to keep classified documents he had taken with
21 him from the White House and to hide and conceal them from a
22 federal grand jury.

23 Then you get to the manner and means paragraph, which
24 says, "The manner and means by which the defendant sought to
25 accomplish the objects and purpose of the conspiracy

1 included..."

2 And so I guess what I'm hearing is we should just, sort
3 of, close our eyes to anything related to documents with
4 classification markings because none of it is necessary?

5 MR. BRATT: So -- and I know in one of our sealed
6 proceedings we had a discussion about the purpose language and
7 whether that is actually motive as opposed -- and we discussed
8 that in our brief, and we cited to the Third Circuit case,
9 Baroni. And that's obviously going to be a discussion we are
10 going to have at a charging stage.

11 THE COURT: Because normally -- my understanding of
12 conspiracy is that you have to join in that unlawful plan. You
13 have to have a mutual purpose. And if the co-defendants have
14 no knowledge of the existence of documents with markings in
15 them, then what is the joint purpose?

16 MR. BRATT: So, again -- and, you know, this will
17 probably be further -- further briefed. And I think, actually,
18 Your Honor may have given an instruction in, I think, the
19 healthcare fraud case that explained purpose being motive as
20 different from --

21 THE COURT: Carver, are you talking about?

22 MR. BRATT: I think so, yes.

23 THE COURT: Okay.

24 MR. BRATT: And so, you know, what the shared goal was
25 here, the shared scheme that they had was to obstruct the

1 investigation. And we have to show that they knew that there
2 was an investigation. We have to show --

3 THE COURT: But the investigation -- the investigation,
4 of course, is seeking things. What things? They're seeking
5 documents with markings. So they -- but they don't have to
6 know that?

7 MR. BRATT: They don't. They have to know that there
8 was an investigation, that the former president was somehow a
9 subject of that or somehow involved in that, and that they were
10 asked to engage in conduct that obstructed that investigation
11 and that they agreed to do so.

12 THE COURT: So the case law on conspiracy that talks
13 about having that shared unlawful purpose, you're -- that's not
14 applicable?

15 MR. BRATT: Not in terms of -- when you define
16 "purpose" as motive, that they don't have to have -- share the
17 motive that the former president did -- had, as set forth in
18 paragraph 96.

19 They do have to have the shared, for lack of a better
20 word, purpose of obstructing the investigation, yes.

21 THE COURT: All right.

22 MR. BRATT: They don't have to share his motive.

23 THE COURT: It's somewhat curious, but all right.

24 Any rebuttal on this point, Mr. Woodward, on Count 33?

25 MR. WOODWARD: Your Honor, I would observe that we

1 have -- we have gotten ourselves into Count 33 and away from
2 Counts 34, 35, 36, 37. And so our principal argument was that
3 I think this analysis is somewhat different in a conspiracy
4 context, where we agree with Your Honor that they have to join
5 in this scheme, there has to be an overt act in furtherance.

6 THE COURT: Well, there's no overt act requirement in
7 this case.

8 MR. WOODWARD: Forgive me --

9 THE COURT: My understanding is that that's incorrect.

10 MR. WOODWARD: Forgive me, Your Honor.

11 With respect to the substantive charges under 1512,
12 there is no allegation in the indictment -- and I think that --
13 I hear the Special Counsel's Office to be conceding that
14 they're not alleging that either Mr. Nauta or -- well, let's
15 stick with Mr. Nauta -- was aware of how he was obstructing
16 this investigation. And -- and so --

17 THE COURT: Well, I don't know if they've said that. I
18 think what they've said is there's no allegation in the
19 indictment that Mr. Nauta knew that the boxes contained
20 classification-marked documents except for the photograph
21 situation, post whenever that happened.

22 MR. WOODWARD: Yes. Okay.

23 THE COURT: Okay.

24 MR. WOODWARD: You are right, Your Honor.

25 And so without alleging that he knew that the documents

1 contained classification markings within the boxes, how is he
2 on notice that that is -- that the criminal obstructive act
3 that he's engaging in in [sic] violation of the statute?

4 We agree with Your Honor, that for him to interfere
5 with an official proceeding, that being the grand jury
6 proceeding and the grand jury's request for things, he has to
7 know what the things are. He has to know that his actions are
8 affecting those -- those things. And in the substantive
9 counts, that's -- that's not alleged. And I don't hear any
10 argument to the contrary, that that is what they're alleging.

11 Your Honor, we would make one additional point with
12 respect to the multiplicity issue that arises in Counts 34, 35,
13 36, and 37, and that's our citation to Yates, both in our
14 underlying briefing and our reply briefing, in which the
15 Supreme Court admonished prosecutors from pursuing an
16 aggressive interpretation of statutes. Yates dealing, of
17 course, with a 15 -- a 1517 or 1519 statute, and ultimately
18 overturning a conviction because of -- of aggressive
19 interpretation.

20 Now, it's a -- it's a parallel that we're making in a
21 very different context, which is that here they have these
22 multiple charges, 1512(b)(2), 1512(c)(1), 1519. And our point,
23 as we make in our briefs, is that they should be forced to
24 choose between Counts 34 and 35, between Counts 36 and 37.

25 THE COURT: Even though they're separate statutes and

1 they have slightly different wording and --

2 MR. WOODWARD: That's an overly aggressive
3 interpretation, and the Supreme Court has admonished against
4 that. And so that's our position.

5 THE COURT: Okay. I understand your argument.

6 All right. Let's make sure we're not overlooking any
7 other counts that you have challenged in your motion.

8 MR. WOODWARD: We've challenged Counts 42 insofar as
9 the indictment fails to specifically allege false statements --
10 excuse me, not 42. 39.

11 The Special Counsel's Office underlines certain
12 statements that they claim are false, that they will prove are
13 false. Our -- our objection to the way that the indictment,
14 excuse me, is framed is, again, a technical one. They sort
15 of -- they sort of interchangeably reference "residence" with
16 "Pine Hall" or --

17 THE COURT: Is that the issue, ultimately, this
18 confusion between "residence" versus "Pine Hall"? I'm trying
19 to understand what is really going on here.

20 MR. WOODWARD: That's our -- that's our issue with the
21 indictment, is that it in -- nowhere is it clear that
22 Mr. Nauta's responses are actually false. And as the Court is
23 aware, if they are true statements, then that changes the
24 nature of the law as applicable to him.

25 Where the boxes -- where the boxes were that he is

1 being asked about is critical, and where the questions being
2 asked are vague and the answers being given relate to the vague
3 questions, this circuit has held that that's an insufficient
4 pleading with respect to --

5 THE COURT: But do those cases actually dismiss counts,
6 dismiss 1001 counts on the basis of vague questioning?

7 MR. WOODWARD: I believe they do, Your Honor. I
8 believe that in --

9 THE COURT: While you're thinking about that, the first
10 half of the questioning, does this concern the boxes that were
11 delivered in January of 2022?

12 MR. WOODWARD: Yes, Your Honor.

13 THE COURT: And is that the same for the remainder of
14 the excerpt? I'm just -- I'm trying to understand if this
15 whole exchange concerned boxes in January or if it's -- if it's
16 related to movement of boxes after that.

17 MR. WOODWARD: I don't believe -- I don't believe it
18 relates to boxes after January. I believe the entire exchange
19 related to the -- the 15 boxes that are provided to NARA in
20 January. But I'm sure my colleagues will correct me if I'm
21 mistaken on that.

22 THE COURT: So when you use the question in the middle
23 of 47 of the superseding indictment, it says: "Do you have any
24 information that could -- that would -- that would help us
25 understand, like, where they were kept, how they were kept,

1 where they were secured?," that's a reference to the -- to
2 which boxes?

3 MR. WOODWARD: The boxes that were provided to NARA in
4 January of 2022.

5 THE COURT: Okay. All right. Now, so why wouldn't
6 this just be an issue for a trier of fact, that they could
7 determine if there was, in fact, a false statement?

8 MR. WOODWARD: Because -- because in -- in this
9 District, the Eleventh Circuit has reversed a Court's failure
10 to dismiss an indictment that lacks essential elements. And
11 where the question and answer are so vague that it is unclear
12 how the -- the answer itself is false, then this -- the
13 prosecutors have failed to plead a 1001 charge.

14 THE COURT: Okay. Let's stop there and turn back to
15 Mr. Bratt, just on this last remaining portion. I think we
16 still have a little bit more to go. But for now, Mr. Bratt,
17 we're talking about Count 39.

18 MR. BRATT: Correct, Your Honor. And I think the Court
19 essentially has ruled on this in its ruling on
20 Mr. De Oliveira's attack on Count 42. These are all jury
21 issues. I believe the cases that Mr. Woodward is citing are
22 cases where a conviction was overturned. But, you know,
23 whether or not, as he alleges in the brief, the answers are
24 literally true, whether or not the questions are sufficiently
25 clear, those are all arguments he can make to the jury. We

1 obviously believe that, given all of the evidence in the case,
2 that Mr. -- we can establish that Mr. Nauta understood the
3 questions he was asked, and that his answers were false.

4 THE COURT: And then, just so I understand, this 1001
5 is based only on the voluntary FBI interview in May; correct?

6 MR. BRATT: Correct.

7 THE COURT: Okay. Now, as far as the question that
8 is -- that is referenced on page 46, where it says, "Does
9 any -- are you aware of any boxes being brought to his home" --

10 MR. BRATT: Yes.

11 THE COURT: -- are those boxes that went straight from
12 the White House to Mar-a-Lago, or is that some other set of
13 boxes?

14 MR. BRATT: So all the boxes originated in the
15 White House and came down to Mar-a-Lago.

16 THE COURT: So it went from the White House straight to
17 Mar-a-Lago?

18 MR. BRATT: And as laid out in the indictment, they
19 had, sort of, their journey within Mar-a-Lago before they ended
20 up first in the storeroom. And as to the 15 or so -- the 15
21 that were returned to NARA, brought up to the residential
22 suite.

23 THE COURT: Okay. Just so -- so just so I understand,
24 the boxes that are the subject of this indictment went straight
25 from the White House to Mar-a-Lago?

1 MR. BRATT: Correct.

2 THE COURT: Okay. All right. Okay. So your point is
3 similar to the De Oliveira arguments that I previously
4 rejected, that all these issues should just be addressed by the
5 jury?

6 MR. BRATT: Correct.

7 THE COURT: Okay.

8 MR. BRATT: There is nothing defective in the way in
9 which it's -- it's charged.

10 THE COURT: Okay. All right. Thank you. I think
11 that's all for now for this count, 39.

12 So let's turn back to Mr. Woodward. And I apologize
13 for the musical chairs.

14 Mr. Woodward, now I think we have covered all the
15 substantive counts except for 41.

16 MR. WOODWARD: I misunderstood the Court's question
17 with -- with -- you asked: Can you cite a case in which an
18 indictment was dismissed, and I -- and I said yes.

19 And I -- I was mistaken. I think I agree with
20 Mr. Bratt. Those were all cases in which a conviction was
21 overturned. And so, first, I apologize for that
22 misunderstanding and that misstatement.

23 But what I would say is, those cases are, nevertheless,
24 applicable where the argument is that the indictment is -- and
25 we have to take the indictment on its face -- where the

1 indictment is failing to make out a charge of a false
2 statement, given that the falsity of the statement isn't clear,
3 again, on its face. And where it's uncertain --

4 THE COURT: But it's alleged that it is false in
5 paragraph 112.

6 MR. WOODWARD: Well, it says that it's false.

7 THE COURT: And I have to accept that.

8 MR. WOODWARD: Your Honor, I don't think you do have to
9 assume that every statement in here ignores all of the other
10 statements in context. When we look at the indictment as a
11 whole and the -- the differing ways in which we're referring to
12 his home, his residence, Pine Hall, that all adds ambiguity to
13 the indictment as a whole that makes it unclear as to Mr. Nauta
14 what he is alleged to have done wrong.

15 Now, the prosecutors can claim that when they come to
16 court and they present evidence, that they will prove that that
17 statement was false based on what they can prove Mr. Nauta knew
18 at the time or what have you, but that's not where we are right
19 now. Where we are is understanding from the indictment what he
20 is alleged to have done. So I won't belabor the point, but I
21 just -- I wanted to apologize for the misstatement and make
22 that clarification.

23 THE COURT: Okay. So, now we are at Count 40; correct?

24 MR. WOODWARD: We are. And we grouped Count 40 and 41
25 together, and I'm -- I'm happy to do the same.

1 THE COURT: So let's treat those together.

2 MR. WOODWARD: And the issue with Count 40 and 41 is
3 similar to that of Count 38, which is that there is no criminal
4 acts alleged to have occurred. What the indictment pleads is
5 that there was an effort to conceal -- that there was an effort
6 to "knowingly corruptly persuade and attempt to persuade
7 another person to destroy, mutilate, conceal an object." 41 is
8 "corruptly alter, destroy, mutilate and conceal a record." But
9 the indictment acknowledges and the Special Counsel's Office
10 has conceded that nothing, in fact, is destroyed. There is no
11 destruction of any video evidence.

12 THE COURT: But it's an attempt.

13 MR. WOODWARD: It is an attempt insofar as there is a
14 conversation alleged to have occurred -- we dispute that -- as
15 between two people. But that's not a criminal act. It is not
16 criminal, for example, to ask about the purchase of drugs
17 and then not to purchase the drugs.

18 They approach a third party. And the allegation,
19 specifically, is that that third party says that the video in
20 question cannot be deleted. Period. There -- there is no
21 effort. There is no -- there is no action --

22 THE COURT: Well, there is a little bit more, if you go
23 back. I'm not sure where it is, but there is some --

24 MR. WOODWARD: Page 27, I think you may be referencing,
25 of the indictment; at least the beginning of the attempt to

1 delete security camera footage.

2 But all of this discussion about whether or not
3 security camera footage can be deleted, that's not criminal in
4 and of itself. The discussion of criminal acts is not itself a
5 crime. Other than "speak to Trump Employee 4 about" -- other
6 than allegedly speaking to Trump Attorney 4 about the
7 possibility of deleting the footage, there is -- there
8 is -- there is, in fact, no allegation that any effort was
9 taken. There is a lot of surplusage in here about the comings
10 and goings of people on the weekend in question, but not that
11 anybody did anything of any substance in order to affect the
12 deletion of video.

13 There is no discussion of accessing the server. There
14 is no discussion of understanding the technical -- what would
15 be required to delete the video. There is simply a discussion
16 about deleting video. Trump Employee 4 says it's not possible,
17 and they go about their business.

18 And, in fact, what is crucial to this -- to the failure
19 of these counts is that no video, in fact, was deleted. They
20 had a conversation. The video can't be deleted. Stop.

21 THE COURT: But if you read this as just the attempt to
22 persuade another person, why is that not adequately alleged?

23 MR. WOODWARD: Well, now it's an attempt to attempt.

24 THE COURT: Well, that's what the statute permits,
25 doesn't it? Attempt to persuade another person under

1 1512(b)(2)(B)?

2 MR. WOODWARD: With the intent to cause an -- that's
3 not how I read the statute. I take -- I take Your Honor's
4 point.

5 THE COURT: 1512(b)(2)(B).

6 MR. WOODWARD: Right. 1512(b)(2)(B).

7 THE COURT: Attempts to do. So it's an attempt to
8 persuade another person to impair an object for use.

9 All right.

10 MR. WOODWARD: That's not what I read the Special
11 Counsel to be arguing, but I will give that some thought.
12 The -- it would -- that would seem to have too many layers
13 as -- as required -- that would seem to criminalize any
14 otherwise innocent conversation that may be -- if the act is
15 undertaken that may be -- that may itself be criminal.

16 And so, if the Special Counsel's position is that
17 1512(b)(2)(B) stands for the proposition that if I ask a
18 colleague whether they are able to destroy evidence and they
19 say no, and that's the end of the conversation, and I have
20 committed the offense under 1512(b)(2), then you're right,
21 perhaps my argument would need to be different, that that is
22 not a -- a constitutional reading of 1512.

23 THE COURT: 12.

24 MR. WOODWARD: 1512(b)(2)(B).

25 THE COURT: Okay.

1 MR. WOODWARD: Because that's an overly expansive
2 interpretation of the statute. But that's -- that's not the
3 argument we made now; that's not what I hear the Special
4 Counsel's Office to be arguing in its --

5 THE COURT: Okay. Well, I will see what Mr. Bratt's
6 thoughts are on Count 40.

7 Is your argument the same for Count 41?

8 MR. WOODWARD: Yes, Your Honor. That in both counts
9 we're alleging, as a criminal act, speaking with a third party
10 about the possibility of deleting video evidence and that --
11 that nothing is, in fact, done in furtherance of that idea.
12 And that it cannot be that simply having a conversation about
13 the deletion of video footage is itself a violation of
14 1512(b) (2) (B) or 1512(c) (1).

15 THE COURT: Factually, the basis for Counts 40 and 41,
16 is there any difference to your understanding?

17 MR. WOODWARD: Not to my understanding, Your Honor.

18 THE COURT: Okay. All right. Now before you sit down,
19 let's just discuss -- you have an array of other criticisms
20 that are laid out in chart format in your motion. I have a few
21 questions.

22 MR. WOODWARD: Yes. I think I have -- I think I have
23 addressed the shotgun pleading criticism, but I'm happy to
24 answer questions.

25 THE COURT: That's not my -- it's the charts that

1 you -- with paragraphs, and then you have a table.

2 MR. WOODWARD: Yes, Your Honor. That's in our opening
3 brief. Beginning on page 5, we have gone through and
4 highlighted all of what we submit are statements that amount to
5 mere surplusage and are precluded by Rule 7(d) of the Federal
6 Rules of Criminal Procedure. There is simply no need for the
7 repeated -- I'm trying to be artful -- characterization of the
8 conduct that is alleged here. And I think what this discussion
9 bears out is that it has amounted to causing confusion about
10 the criminal acts that are actually being charged.

11 Mr. Bratt concedes they weren't required to bring a
12 speaking indictment. They did so, and they now must bear the
13 consequences of the same.

14 THE COURT: Okay. I have just a couple of specific
15 questions. You say there was improper hearsay about Nauta in
16 paragraph 28.

17 MR. WOODWARD: Yes.

18 THE COURT: Can you explain what you mean.

19 MR. WOODWARD: You --

20 THE COURT: This is an exchange between two Trump
21 employees. What's your argument?

22 MR. WOODWARD: I'm sorry, Your Honor. I don't
23 remember, but bear with me one second.

24 THE COURT: Okay. Well, if you don't remember, then
25 you should have been prepared to address this.

1 MR. WOODWARD: Yes, Your Honor. I --

2 THE COURT: Okay.

3 MR. WOODWARD: -- I fully recognize that.

4 THE COURT: Next would be, then, the quotations from
5 content that you say is protected by the former president's
6 attorney-client privilege.

7 MR. WOODWARD: I think it was -- we submit that it was
8 wholly improper to include potentially privileged
9 communications in the indictment. That -- whether those
10 communications ultimately are determined not to be privileged
11 for purposes of a trial in this matter is a -- is a separate
12 and distinct argument from whether they could be disclosed as
13 part of the prosecutors' investigation in this case.

14 THE COURT: But, of course, they would say they
15 obtained a court order that authorized the piercing of the
16 privilege, and, therefore, they were free to use that
17 information in an indictment.

18 MR. WOODWARD: And we would submit that -- that, A, was
19 not litigated in this district. That goes back to our argument
20 this morning about whether it was permissible to disclose grand
21 jury materials without getting permission from the district
22 court in which those materials were garnered; and B, that the
23 standard for piercing attorney-client privilege at the
24 investigatory stage is different from in a public forum like
25 this.

1 THE COURT: Okay. And then some of this other stuff
2 that you would take issue with, even assuming it were viewed as
3 unduly prejudicial, perhaps would the solution be courts have
4 discretion whether to give juries a copy of the indictment
5 during deliberations?

6 MR. WOODWARD: If it were concluded that it was unduly
7 prejudicial, then I think where we again are, is not about
8 "unduly prejudicial to the jury," but it's unduly prejudicial
9 to Mr. Nauta and should not have been presented to the grand
10 jury as such.

11 THE COURT: Okay. All right. Anything further? I
12 will hear from Mr. Bratt, and then we will be winding down.

13 And then, perhaps, I will give you just a couple of
14 minutes, because this is your motion joined by the other two
15 defendants. So, okay.

16 MR. WOODWARD: Thank you, Your Honor.

17 THE COURT: Thank you.

18 Mr. Bratt, I want to make sure I keep track of where we
19 were. This last piece concerned Count 40, I believe.

20 MR. BRATT: 40 and 41, Your Honor.

21 THE COURT: Okay.

22 MR. BRATT: Yes. So our response to that is similar to
23 the response with respect to the false statement challenges
24 that they're making. What Mr. Woodward articulated to the
25 Court may turn out to be a persuasive closing argument, but

1 those are all factual issues for the jury. The indictment does
2 not charge people with having a conversation or merely
3 discussing. Our view is that if you take all the facts that we
4 have detailed in the indictment, plus whatever additional
5 evidence on the activities particularly Mr. Nauta took with
6 respect to the video footage, that we can convince a jury that
7 the defendants violated what -- violated the provisions of 1512
8 that are set forth in Counts 40 and 41.

9 THE COURT: Going back to the statutory text for a
10 moment, the 1512(b)(2)(B).

11 MR. BRATT: Yes.

12 THE COURT: Am I correct how I -- how I attempted to
13 jump through the language to get to the charge?

14 MR. BRATT: Yes.

15 THE COURT: It would be -- how do you get "knowingly
16 corruptly"? "Knowingly corruptly persuade" and then "attempt
17 to persuade," can you explain that to me? Again, I'm having
18 trouble with these multiple mens reas stacked on top of each
19 other with the statutory language.

20 MR. BRATT: So we get it from the statute. And we --

21 THE COURT: Because this says, "Whoever knowingly uses
22 intimidation, threatens" --

23 MR. BRATT: And I guess --

24 THE COURT: -- "or corruptly persuades," so does
25 "knowingly" go with the "corrupt" portion?

1 MR. BRATT: So our -- having once been an English
2 major, the way I read this is that the "knowingly" modifies the
3 "corruptly" in this sentence. My grammar may be off, but --

4 THE COURT: Okay. So we bring the "knowingly" over --

5 MR. BRATT: Right.

6 THE COURT: -- and we get "to." Okay. And then keep
7 going.

8 MR. BRATT: And then "knowingly corruptly persuades
9 another person or attempts to do so." And our theory here is
10 an attempt to -- and I don't want to mangle the language, so I
11 will go back to the indictment and stop looking at the
12 statute -- "to persuade another person with intent to cause and
13 induce any person to alter, destroy, mutilate, and conceal an
14 object with intent to impair the object's integrity and
15 availability for use in the official proceeding."

16 THE COURT: Okay. And is this intended to say that all
17 three defendants made the request of Trump Employee 4?

18 MR. BRATT: So in this particular count, Former
19 President Trump is charged as a principal. He is also charged
20 as a coconspirator. And as set forth in the indictment, the
21 two individuals that carried out the request were Mr. Nauta and
22 Mr. De Oliveira.

23 THE COURT: Okay. The paragraphs, the factual
24 allegation paragraphs that principally go to this charge are
25 which ones?

1 MR. BRATT: So paragraph 74 through paragraph 87.

2 THE COURT: Okay.

3 MR. WOODWARD: I'm sorry, Your Honor. I didn't hear
4 that.

5 THE COURT: 74 through 87.

6 Is that correct, Mr. Bratt?

7 MR. BRATT: That's correct, yes, Your Honor.

8 THE COURT: Okay. Okay.

9 Okay. What's your best case, I'm just curious, for
10 this concept of that you don't really need to know what the
11 grand jury wants, you just need to know that they want
12 something and that there is a grand jury?

13 MR. BRATT: Give me one second, Your Honor.

14 So it is the Beach case, United States vs. Beach. I
15 don't have the citation right at the tip of my fingers.

16 THE COURT: Beach. Okay. That's an Eleventh Circuit
17 case?

18 MR. BRATT: Yes, Your Honor. Yes.

19 THE COURT: Okay. Spelled like "the beach, we go to
20 the beach"?

21 MR. BRATT: Yes. Common spelling.

22 THE COURT: All right. Okay.

23 Now, just -- just to handle the potpourri of -- of
24 criticisms of various paragraphs, I had a couple of questions
25 on -- on the hearsay --

1 MR. BRATT: Yes.

2 THE COURT: -- paragraph. This is 28.

3 MR. BRATT: Correct.

4 THE COURT: What's your argument on that?

5 MR. BRATT: Our argument is that it's admissible under
6 Rule 801(d) -- small (d), (2), capital (D) -- that these were
7 statements of agents of the former president made within the
8 scope of their employment.

9 THE COURT: Okay. In general, would you agree with the
10 proposition that inadmissible evidence shouldn't be contained
11 in an indictment?

12 MR. BRATT: In general, I would. And, again, I don't
13 think we've put anything in here that we believe is
14 inadmissible.

15 THE COURT: Okay.

16 MR. BRATT: The Court may, obviously, disagree at some
17 point, but we have theories for admissibility as to the facts
18 that are in the indictment.

19 THE COURT: There is some suggestion in this -- this
20 breakdown of criticisms, for example, as to uncharged offense
21 allegations related, for example, to alleged discussions. And
22 this, of course, is not a transmission case, it's a retention
23 case.

24 MR. BRATT: Sure.

25 THE COURT: So I would like to hear your argument on

1 why those allegations are included in the superseding
2 indictment.

3 MR. BRATT: Yes. So I have to get the paragraph that
4 they're referring -- paragraphs they're referring to.

5 THE COURT: The chart says 6, and then 34 through 36.

6 MR. BRATT: Yes. The bulk of it's 34 through 36.

7 And so our theory of -- so first, for 34 and 35, we
8 believe that's direct proof of Count 32. That's part of our
9 direct proof of Count 32.

10 THE COURT: You mean for intent?

11 MR. BRATT: Not just for intent; that the documents
12 that he showed that are at Bedminster --

13 THE COURT: Okay. Count 32. Okay.

14 MR. BRATT: That that's part of our direct proof in
15 conjunction with other --

16 THE COURT: What about the other section that concerns,
17 I guess --

18 MR. BRATT: 36.

19 THE COURT: -- 36 and --

20 MR. BRATT: Right, the PAC representative. So that
21 would be something we would be submitting to the Court as
22 Rule 404(b) evidence.

23 THE COURT: Do you normally include 404(b) in
24 indictments?

25 MR. BRATT: I have, yes.

1 THE COURT: Okay.

2 MR. BRATT: In fact, I once had a whole case that was
3 premised on Rule 404(b). If we didn't get it in, we didn't
4 have a case.

5 THE COURT: Typically, though, it comes in the form of
6 notice in a motion, not necessarily in the indictment itself.
7 And that's what I'm wondering.

8 MR. BRATT: But I -- yes, I have done it before.

9 THE COURT: Is that proper?

10 MR. BRATT: Nobody said it was improper. And,
11 particularly in the case of which I'm thinking, we could not
12 have proved the case without the 404(b). If --

13 THE COURT: Okay. So just so I understand, the theory
14 of admissibility for paragraph 36, for example, would be under
15 a 404(b) rationale?

16 MR. BRATT: Yes, that's correct.

17 THE COURT: Okay. What about the other various
18 allegations concerning just, the Mar-a-Lago in general --

19 MR. BRATT: Yes.

20 THE COURT: -- it being a club? Is that actually
21 relevant to the retention counts?

22 MR. BRATT: Yes, it is.

23 THE COURT: Okay. Explain.

24 MR. BRATT: So first, the former president has
25 publicly -- and I believe there is also some references in the

1 pleadings that, essentially, Mar-a-Lago was a fortress; and so
2 no harm, no foul.

3 And so, one, it rebuts that defense. But, two, we are
4 now in agreement with the defense --

5 THE COURT: But, I guess, stop there for a minute.

6 It wasn't my understanding that indictments were really
7 intended to sort of preview and rebut any anticipated defense.

8 MR. BRATT: Right.

9 THE COURT: That's not generally the format and purpose
10 of an indictment.

11 MR. BRATT: But I have a more important point.

12 THE COURT: Okay.

13 MR. BRATT: And the more important point is that, as
14 we've now discussed in defining National Defense information,
15 the potential for harm is part of what we're going to have to
16 show. And so showing evidence of what the unauthorized
17 location was like and the ability for people to get improper
18 access to the -- to the documents is highly relevant.

19 THE COURT: Explain the "potential for harm" argument.
20 Is that part of the elements on the 793(e)?

21 MR. BRATT: Both sides have agreed that -- we didn't
22 agree much on our proposed jury instructions, but that if --

23 THE COURT: Because I didn't see that in your
24 submission, that there was an intent -- was that -- was that
25 briefed that you -- that that element has now been concededly

1 added?

2 MR. BRATT: Yes, yes.

3 THE COURT: Okay. Where is that and which filing?

4 Well, I guess that would be unfair to ask you for a docket
5 entry number, but --

6 MR. BRATT: Right. I mean, it is -- the Court asked
7 for proposed jury instructions, but we also have -- we
8 discussed it at one of the hearings in March and Judge Ellis'
9 opinion in Rosen. And we -- the gloss -- the Morison gloss
10 that -- that has been adopted by several courts. And
11 Your Honor asked me some questions about it.

12 THE COURT: The answer at that time was, "We're not
13 sure." So I -- "we're not sure if we're going to be seeking
14 that extra element."

15 MR. BRATT: I wasn't -- it was kind of an odd answer.
16 But because this is an issue that comes up, we had wanted to
17 consult with the National Security Division. But it was
18 certainly something that we've always had in mind as something
19 that we may have to prove.

20 THE COURT: Okay. Because I don't recall that being
21 added as an element in that excerpt, but I might have just
22 missed that.

23 MR. BRATT: They have asked for it, and we included
24 that language in our proposal.

25 THE COURT: In the written filing?

1 MR. BRATT: Yes, yes.

2 THE COURT: Okay. All right. So how many total
3 glosses, then, would there be added on the 793(e) counts?

4 You have the closely-held gloss --

5 MR. BRATT: This is part of the definition of closely
6 held. Or actually, it's not, I'm sorry. It's closely held
7 that -- it would be easier if I had the instruction in front of
8 me. I --

9 THE COURT: Okay.

10 MR. BRATT: I don't want to mangle it.

11 THE COURT: I just want to make sure we stay fairly
12 close to what is in the statute.

13 MR. BRATT: Yes.

14 THE COURT: So, okay. All right. So any other
15 comments to make about the various items in the chart? I don't
16 think I have anything else.

17 MR. BRATT: No. I mean, I think Your Honor picked up
18 on what is an important point. This really is not something
19 the Court needs to decide now. It is -- and the Court may or
20 may not decide to send the indictment back to the jury. If, as
21 the trial comes out and the Court decides that the indictment
22 is going back to the jury, but there is something that we
23 didn't prove, that the Court then feels should not be in the
24 indictment, obviously we can address that then.

25 THE COURT: Okay. Thank you, Mr. Bratt.

1 It's 3:18.

2 Mr. Woodward, I want to give you five minutes or so to
3 wrap up, and then we will be in recess.

4 MR. WOODWARD: Thank you, Your Honor.

5 I don't -- I hope we don't need five minutes. I think
6 the Court understands our position. I apologize for being
7 flat-footed with respect to the hearsay. But the Court
8 understood what our objection was, that is inadmissible hearsay
9 as against Mr. Nauta.

10 And as a -- as a broad matter, you know, again, we
11 submit that your colloquy with the Special Counsel's Office
12 underscores our point that this indictment is including all
13 sorts of allegations unnecessary to establish the elements of
14 the offense, which, again, we submit aren't clear on the face
15 of the indictment to begin with. And it's just overly
16 complicating things. Whether this goes to the -- whether the
17 indictment goes to the grand jury or not is a separate issue
18 from whether or not it meets the pleading standard of Rule 7.

19 And, you know, where the Special Counsel's Office is
20 standing here explaining to you how there might be an
21 additional gloss on the 793 count, and so for that reason, we
22 included maybe this additional language in the indictment, I
23 mean, that just -- that defies credulity. I mean, they
24 included these statements about Mar-a-Lago being a fortress or
25 lack thereof because it was attention-grabbing at the time.

1 It's now been over a year and -- or just about a year,
2 and we're finally getting to the heart of the matter with the
3 disclosure of some of these materials on a public docket.

4 So, you know, it would be an undertaking, to be sure,
5 to rewrite this indictment. But, you know, again, they elected
6 to bring a speaking indictment. And if the -- if the Special
7 Counsel's Office is going to do that, if prosecutors are going
8 to be doing that, they should be held to a standard in which
9 the indictment reflects the accuracy of the evidence that will
10 be presented and the charges that have been brought.

11 THE COURT: Okay. Thank you. All right. Then by
12 Friday, please make sure to do the housekeeping I asked for in
13 the beginning.

14 I wish you all --

15 MR. WOODWARD: In addition, my preliminary research at
16 counsel's table suggests that the requirement that the act be a
17 crime under 2(B) persists. And so, if the principal is being
18 caused to -- to do something that is also not a crime as to the
19 principal, then 2(B) doesn't apply. So with the Court's
20 permission, I will submit something brief by Friday as well,
21 just giving the Court the case that we're --

22 THE COURT: Okay. I will permit a letter of
23 supplemental authority in accordance with the local rules,
24 which has a strict word limit.

25 MR. WOODWARD: Okay. Thank you.

1 THE COURT: So please keep that in mind by Friday.

2 And then Friday is also the deadline for just the
3 housekeeping of the -- of the docketing that I asked for.

4 As far as the two motions are concerned, they're taken
5 under advisement. And I believe that's all I have for now.

6 So safe travels to your respective homes. The Court is
7 in recess.

8 (These proceedings concluded at 3:23 p.m.)

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I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

<u>DATE:</u> 05-23-2024	/s/Laura Melton
	LAURA E. MELTON, RMR, CRR, FPR
	Official Court Reporter
	United States District Court
	Southern District of Florida
	Fort Pierce, Florida

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